

IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 142 OF 2021

THERESIA FRANCIS KIWORI (as the administrator of the estate of
FRANCIS JOSEPH KIWORI deceased).....**PLAINTIFF**

VERSUS

MICHAEL JOSEPH KIWORI.....**1ST DEFENDANT**
DAWSON MARIKO NJAU.....**2ND DEFENDANT**

JUDGEMENT

Date of Last Order: 29/07/2022

Date of Delivery: 19/08/2022

AMOUR S. KHAMIS, J:-

Theresia Francis Kiwori is a widow and administratrix of the estate of the late Francis Joseph Kiwori who died intestate on 31 August 2003.

The deceased was survived by a mother Matilda Francis Kiwori, children Joseph Francis Kiwori and Peter Francis Kiwori and a wife, Theresia.

Through Administration Cause No. 432 of 2011, the Kinondoni Primary Court appointed Theresia @ Tedy Francis Kiwori as administratrix of the estate.

Exercising his powers under Section 44(1) of the Law of Limitation Act, Cap 89, R.E. 2019, on 16 August 2021 the Minister for Constitutional and Legal Affairs extended the period of limitation for institution of a suit in favour of Theresia Francis Kiwori as administratrix of the estate.

Acting on that extention, Theresia Francis Kiwori as administratrix of her late husband's estate, filed the present suit against her brother in law, Michael Joseph Kiwori and one Dawson Mariko Njau.

Among others, Theresia Francis Kiwori moved this Court for declaration that she is the lawful owner of premises and a house located at Michungwani street, Kimara Kingong'o area, Ubungo Municipality, Dar es Salaam City.

She also asked the Court to declare that any sale of the disputed property by Michael Joseph Kiwori to any third party or purchaser was unlawful.

In addition, she sought for a permanent injunction restraining Michael Joseph Kiwori, his workmen, agents, heirs and servants from interfering with her peaceful enjoyment of the suit premises.

That list of reliefs also included payment of TZS 50,000,000/= being irretrievable loss of income occasioned by Michael Joseph Kiwori, interest at commercial rate of 30% per annum from date of accrual in 2003 to the date of judgement, interest at Court rate per annum from date of judgement to the date of satisfaction, and costs of the suit.

Not only that but Theresia Francis Kiwori also prayed for general damages of Tshs. 50,000,000/= against Michael Joseph Kiwori and any other relief that the Honorable Court deems fit and just to grant.

Theresia Francis Kiwori pleaded that her late husband bought the disputed land from Dawson Mariko Njau on 19 July 1980 for Tshs. 30,000/= and the purchase price was fully paid by 4 October 1981.

The plaint show after completion of the purchase price, the late Francis Joseph Kiwori invited his young brother, Michael Joseph Kiwori to the live on the disputed land allegedly because his house in Manzese could not accommodate his extended family.

It was alleged that after death of Francis Joseph Kiwori, Michael Joseph Kiwori refused to vacate and handover the disputed land to the widow.

Further, Theresia Francis Kiwori averred that the disputed land formed part of the matrimonial property and was a result of her efforts in a marriage with the deceased celebrated on 2 December 1979.

She further averred that Michael Joseph Kiwori's act deprived her and the deceased's children the right to enjoyment of the property and generate income therefrom.

The widow alleged that as a result of deprivation of the property, she was subjected into severe financial hardship as well as mental and physical torture.

Furthermore, the widow claimed that her family was rendered homeless following demolition of their house at Mbezi Kimara to pave way for the extension of Morogoro road.

In an Amended Written Statement of Defence, Michael Joseph Kiwori generally disputed allegations by his sister in law and subjected her to strictest proof thereof.

Specifically, Michael Joseph Kiwori averred that his late brother Francis Joseph Kiwori gave him part of the land he bought which enabled him to live thereon uninterruptedly for more that forty (40) years.

In further reply, he stated that he witnessed purchase of the disputed land by the late Francis Joseph Kiwori in 1980.

He alleged that immediately upon purchase of the land, Francis Joseph Kiwori asked him to move thereon partly to protect it from trespassers who attempted to encroach the area.

Michael Joseph Kiwori Said after moving in the land in 1981, he started small scale farming activities including planting of banana trees, pineapples, oranges and cassava.

He said the deceased's original plan was to divide the land amongst five (5) siblings living in Dar es Salaam by then, namely:

Francis Joseph Kiwori, Festo Joseph Kiwori (deceased), Michael Joseph Kiwori, Evarest Joseph Kiwori, and Richard Joseph Kiwori.

The Amended Written Statement of Defence show that Festo Joseph Kiwori Evarest Joseph Kiwori and Richard Joseph Kiwori

declined to move onto the land in dispute on a reason that it was not wise for all siblings to live in one and the same area.

Following refusal of the three siblings and acceptance of Michael Joseph Kiwori to occupy the land, Francis Joseph Kiwori (deceased) divided the land into two halves in 1985; one for himself and the other half for Michael Joseph Kiwori.

In a further reply, Michael Joseph Kiwori stated that the original land purchased by Francis Joseph Kiwori had no access to the main road a reason that prompted him to approach a neighbor, one Bibi Buna, for a stretch of land that could open the area.

He alleged that Bibi Buna accepted the request and offered a parcel of land measuring approximately 17 meters width and 70 meters length adjacent to the land in dispute whereat he constructed four (4) houses that exists todate.

Michael Joseph Kiwori alleged that the late Francis Joseph Kiwori sold his parcel of land to Andrew Mawagai in 1990 and Evarist Macha in 2002.

He stated that half of the purchased land given to him by Francis Joseph Kiwori was developed overtime and currently accommodates six (6) houses.

He clarified that the disputed land currently accommodates a total of ten (10) houses including those built on the land given by the late Bibi Buna.

Michael Joseph Kiwori pleaded that Theresia Francis Kiwori was fully aware of all developments taking place in the disputed land including its division into two halves.

It was further pleaded that for the first time, Theresia Francis Kiwori raised her concerns in a clan meeting following death of her husband which was held at Kirua Vunjo area, Moshi District in 2003 and the meeting reminded her of the division in respect of the dispute land done, before Francis Joseph Kiwori passed on.

Further, Michael Joseph Kiwori alleged that Theresia Francis Kiwori was offered and accepted a token appreciation for the improvements on the land in dispute.

He added that the clan meeting approved Theresia Francis Kiwori's demand for Tshs. 150,000/= as a token appreciation for the disputed land which he (Michael Joseph Kiwori) paid immediately (Tshs. 100,000/=) in Kirua Vunjo and Tshs. 50,000/= at Mbezi kwa Msuguri area, Dar es Salaam.

Furthermore, Michael Joseph Kiwori stated that parties lived in peace and harmony since 2003 and cooperated in numerous family occasion including wedding and send off ceremonies for Theresia's eldest son Joseph Francis Kiwori in 2011 and Michael's daughter, Anna Michael Kiwori in July 2020 respectively.

He contended that throughout the period from 2003 to January 2021, Theresia Francis Kiwori did not raise any claim over the disputed land until January 2021 when she wrote a demand letter without consulting clan orders.

He added that the family elders attempted to reconcile the parties to no avail

In a further response, Michael Joseph Kiwori challenged the claim on the ground that when Theresia Francis Kiwori applied for letter of administration in respect of the estate of the late Francis Joseph Kiwori in 2012 at Kinondoni Primary Court, she did not enlist the disputed land as part of the deceased's estate.

Further, he said on 29 February 2016, Theresia Francis Kiwori wrote a letter to the Primary Court Magistrate In charge at Kinondoni Primary Court accounting for distribution of the deceased's properties amongst heirs out the list did not included the disputed land.

In a reply to the Amended Written Statement of Defence, Theresia Francis Kiwori generally disputed Michael Joseph Kiwori's allegations and subjected him to the strictest proof thereof.

In particular, she asserted that the late Francis Joseph Kiwori did not divide the disputed land into two houses, he did not sale the land to Andrew Mawagai in 1990 and that his purposed signature in annexure "MJK - 1" to the Amended Written Statement of Defence was forged.

Further she averred that she could not accept a Tshs. 150,000/= compensation in 2003 while small part of the said land was allegedly sold by her late husband in 2002 for Tshs. 3,500,000/=.

She said that there has never been harmony between parties and the clan leaders failed to reconcile them.

As regards to records at Kinondoni Primary Court, Theresia Francis Kiwori stated that the issue was not probate but land ownership.

She admitted that the disputed land was not enlisted in the probate matter but added that the omission did not prevent her to claim as it formed part of the estate.

On 15 March 2022 this Court struck out the name of Dawson Marko Njau, the second defendant herein, on the ground that he was a mere seller of the disputed land which fact was not disputed.

Mediation was attempted but did not succeed. The matter proceeded to trial on two main issues:

- 1) *Who is the lawful owner of the disputed property*
- 2) *What reliefs are the parties entitled to.*

Trial started before, my sister Hon. Mnenegoha, J whereby PW1 and PW2 testified.

Subsequently, it was re- assigned to me and proceeded in terms of Order ***XVIII Rule 10 of the CIVIL PROCEDURE CODE, CAP 33, R.E 2019.***

A total of five (5) witnesses testified for the plaintiff, Theresia Francis Kiwori, and five (5) witnesses for the defendant, Michael Joseph Kiwori.

Throughout the life span of the case, the plaintiff, Theresia Francis Kiwori as administratrix of the estate of the late Francis Joseph Kiwori, was represented by Mr. Fred Calist learned advocate of this Court.

Mr. Laurian Mussa and Ms. Anna Tupa, learned advocates, offered their legal services to the defendant, Michael Joseph Kiwori.

Upon conclusion of trial, parties made sprinted submissions in support of their respective cases.

I am grateful to the rival counsel for their research in support of their respective client's positions.

I have read and considered the submissions on record and where relevant, the same will be referred to in the course of tackling the issues on record.

From the outset, I should put to record that the plaintiff produced five (5) exhibits and the defendant had two (2) exhibits admitted in evidence.

The first issue is who is the lawful owner of the disputed property? This is the main issue that requires analysis of the evidence on record, a task that I will shortly do.

PW1 THERESIA FRANCIS KIWORI, the plaintiff herein, testified that the dispute started immediately after the disputed farm (land) was bought in 1980.

She stated that there was misunderstanding between the late Francis Kiwori and Michael Kiwori.

To emphasize the point, she said that:

“Mume wangu alikuwa analalamika kila akienda alikuwa akimkuta mke wa Shemeji yangu ananitolea kiti nje. Hamkaribishi ndani. Kulikuwa na mgogoro kuanzia tuliponunua hili shamba mwaka 1980 kati ya mume wangu tangu shamba linunuliwe hadi mume wangu amefariki mwaka 2003”

On examination in chief, she stated that after death of Francis Joseph Kiwori, the dispute was under cover but no solution was found.

She said that the entire clan was scared of Michael Joseph Kiwori, a reason that made her come to Court directly.

On this note, she added.

“Mimi niliamua kuja Mahakamani sijawahi kumwambia aniachie au anipe eneo langu. Nilikuja moja kwa moja.....”

On further examination, PW1 said that she built a house and delivered iron sheet to disputed land, thus:

“Nimejenga nyumba, nimepeleka mabati. Naomba Mahakama tukufu iingilie kati”.

There was no much cross examination on PW1 other than her maiden and assumed names after marriage with the deceased.

PW2 DAWSON MICHAEL NJAU, said he was a friend and neighbor to the late FRANCIS JOSEPH KIWORI.

He testified that the late Francis Joseph Kiwori bought a farm from him in 1981 for Tshs. 15,000/=.

He said all witnesses to the sale agreement were dead and the farm measured about four to five acres.

On cross examination, PW2 admitted that the sale agreement (Exhibit P.2) did not show size of the farm.

Questioned about the dispute, PW2 said that he was not privy to the internal family arrangements of the late Francis J. Kiwori.

Regarding Michael Joseph Kiwori, the witness said he recognized him as a neighbor.

In terms of Rule 2 (1) of Order XVIII of the **CIVIL PROCEDURE CODE, CAP 33, R.E. 2019** as amended by **THE CIVIL PROCEDURE CODE (AMENDMENT OF THE FIRST SCHEDULE) RULES, 2021**, the evidence in chief of PW3, PW4, PW5, DW1, DW2, DW3, DW4, and DW5 were given through witness statements.

PW3 JOSEPH FRANCIS KIWORI, son of the plaintiff and the late Francis Joseph Kiwori, said the dispute existed for more than twenty five (25) years but no steps were taken because the plaintiff was sick.

On cross examination by Ms. Anna Tupa, he said previously the dispute was underground but subsequently boomed to the extent that family members did not talk to each other.

On further cross examination, PW3 said he got to know the disputed land belonged to his father in the year 1993 or 1994 upon visiting it.

On further questioning, he said that:

“After death of my father and due to sickness of my mother, we slowly collected properties left by the deceased father including this disputed land. As children we were busy schooling.”

PW4 FOKAS JOHN NYALU, a grandson to the late Francis Joseph Kiwori for clan lineage and a young brother to him in terms of age gap, said at the time of purchase of the disputed house he lived in the house of the late Francis Kiwori at Manzese Dar es Salaam.

Owing to closeness with the late Francis Joseph Kiwori, PW4 was made a witness to the purchase process involving Dawson Michael @ Marko Njau (PW2).

Regarding the sale agreement (Exhibit P.2) PW4 said that he was a signatory to it as a witness.

On cross examination by Ms. Anna Tupa, PW4 stated that”

“When I left Francis Kiwori’s house, Michael Joseph Kiwori had left the Manzese house and moved to the land that the said Francis Joseph Kiwori bought in Kimara King’ong’o, Dar es Salaam. I did not know as to why he moved to stay in Kimara.

Until Francis Kiwori died, I had not heard of any misunderstanding for Michael Joseph Kiwori to stay at his Kimara land.

Prior to the present case, I had not heard of any dispute in the family over the Kimara farm until when I was told about the present dispute”.

The witness who visited the disputed land for the last time in 1981, said the late Francis Joseph Kiwori did not involve him in the management and or plans regarding the disputed land.

On re – examination by Mr. Fred Callist, PW4 who also worked in the deceased’s soap factory up to 1985, said:

“From that time to date, I have never heard of any dispute on that farm in Kimara. I used to meet with the deceased from time to time although we did not talk about the disputed property in Kimara”.

PW5 MRUNGE AKILEI MACHA is related to the late Francis Joseph Kiwori and Michael Joseph Kiwori as he married their niece.

He testified that on 5 November 1994, the late Francis Joseph Kiwori sold to him a piece of land located at Kimara Michungwani, King’ong’o area, Ubungo Municipality, Dar es Salaam.

He tendered the sale agreement witnessed by Michael Joseph Kiwori (defendant) admitted as Exhibit P.5.

On cross examination by Mr. Laurian Mussa, the witness said he moved to his land in 1994 and since then Michael Joseph Kiwori became a neighbor.

On cross examination by Ms. Anna Tupa, PW5 said, after death of Francis J. Kiwori, the plaintiff visited the area on a number of times and complained to him of a cold welcome she received from the wife of Michael Joseph Kiwori.

DW1 MICHAEL JOSEPH KIWORI, the defendant herein, repeated the averments in the Amended Written Statement of Defence and said the disputed land was allocated to him by the late Francis Joseph Kiwori in 1985.

On examination in chief, the witness said:

“9. That in 1985, my brother allocated me with a plot of land whereat I constructed my first house while I was still a bachelor. Later on, my brother divided the land in dispute in two halves; one for himself and the other was given to me. He allocated me the part which partly consisted the plot where I had constructed my first house”.

On further examination DW1 said the late Francis Joseph Kiwori sold his portion of land to Andrew Mawagali and Evarist Macha (PW5).

Regarding occupation of the disputed land, DW1 said:

"12. That I had uninterruptedly lived and developed part of the allocated land by constructing for houses before the death of my brother which occurred on 31st August 2003.

"13. That after the death of my brother, I continued uninterruptedly to develop the land in dispute and to date, I have constructed six houses. This makes a total of ten (10) residential houses built partly on the land in dispute and partly on the land acquired from Bibi Buna."

On the present dispute and steps taken to address it, DW1 testified:

"14. That in September 2003, during a clan meeting held at Kirua Vunjo Moshi, the plaintiff raised an issue related to the land in dispute. One of the members in the meeting, Evarist Joseph Kiwori, elaborated to the clan that part of the land in dispute was given to me by my brother, plaintiff's deceased husband.

"15. That the plaintiff through the clan meeting accepted and asked for a token of appreciation from me for the land in dispute. The plaintiff asked for Tanzania Shillings One Hundred Fifty Thousand (TAS 150,000/=). I paid the plaintiff the said amount in two instalments to wit: Tanzania Shillings One Hundred Thousand (TAS 100,000/=) at Kirua Vunjo – Moshi (immediately after the clan meeting) and Tanzania Shillings Fifty Thousand (TAS 50,000/=) at the plaintiff's house – Mbezi kwa Msuguri – Dar es Salaam after we had come back from Moshi in the

presence of my siblings, Evarist Joseph Kiwori and Richard Joseph Kiwori.”

DW1 said he lived peacefully and in harmony with the plaintiff and cooperated in various family events such as marriage and send offs.

He wondered why the plaintiff omitted to enlist the disputed property at the time of applying for letters of administration in 2012 and in 2015 when she presented a statement of account showing how the estate was managed and disturbed.

Insisting that the disputed property belonged to him, DW1 said:

“19. That I state from the year 2003 to January 2021 there has never been a claim from the plaintiff related to the land in dispute and if one ever existed it has never been brought before any family and /or clan meeting save for demand letter which was served upon me in January 2021 and my reply thereto.....”

On cross examination by Mr. Fred Callist, DW 1 said the land was orally given to him by the late Francis Joseph Kiwori.

He added that having lived thereon for over forty (40) years, he was owner of the land.

On further cross examination, the witness said”

“In 1985, the late Francis Kiwori divided his land into two parts: one part for himself and the remaining part for me. Evarist Joseph Kiwori was present when the deceased made that division of the farm”.

Regarding a portion of land given by Bibi Buna, DW1 said:

"In para. 10 of the Statement I referred to bibi Buna who gave me a portion of her land that I used as a way to access the road. There are witnesses who saw her giving me the lang. It was not in writing..."

DW2 EVARIST JOSEPH KIWORI, a young brother to Francis and Michael Joseph Kiwori, stated that Michael J. Kiwori was asked by Francis Kiwori to move to the disputed land partly to protect it against trespassers and also to develop it.

Regarding the deceased's plan on the land, he said:

"4. That I remember my eldest brother to have intimated to us (Festo Kiwori now deceased), Michael Joseph Kiwori, Evarest Joseph Kiwori and Richard Joseph Kiwori) of his intention to divide the land in dispute amongst ourselves.

5. That I declined the offer as I had secured a plot at Manzese Midizini which is close to a place where my brother was living. In addition, I did not see it wise for all relatives to live in one place. In addition, Manzese was relatively closer to my work place at MT Deport – Keko compared to Kimara".

On examination in chief, DW2 said Francis J. Kiwori and Michael J. Kiwori continued with the plan thus;

"7. That my eldest brother divided the land in two parts one for himself and the other part for the defendant. My brother called us, the siblings (Michael Joseph Kiwori, Evarist

Joseph Kiwori) to witness the division of the land in dispute. He forwarded that it is important that all of us witness the division lest a risk of potential disputes”.

The witness said during the time that Michael Kiwori developed the disputed land the plaintiff, the late Francis J. Kiwori and other family members were aware of it.

He referred to the 2003 clan meeting held at Kirua Vunjo, Moshi where the disputed land was discussed and he (DW2) intervened thus:

“10. I told and elaborated that part of the land in dispute was given to the defendant by my eldest brother, plaintiff's deceased husband.”

The witness also referred to a demand and payment of TZS 150,000/= by the defendant to the plaintiff in 2003 as a token appreciation in respect of the land.

On further examination, DW2 said between 2003 and 2021, he never heard of any complaint relating to the land in dispute.

On cross examination by Mr. Fred Callist, the witness stated.

“I have no written document to show division of the farm by the late Francis Kiwori. However, I was present when the deceased divided the farm as shown in par 7 of the statement.....”

On further cross examination, DW2 said:

“.....I personally saw the defendant build houses in the disputed land before Francis Kiwori died”.

On re – examination by Mr. Laurian Mussa, DW2 explained the basis for a token appreciation allegedly given to the plaintiff, thus:

“Tshs. 150,000/= was paid to the plaintiff. She claimed that when the deceased was alive, she contributed ten (10) corrugated iron sheets in constructing a hut in the disputed farm.

The defendant accepted the demand and accordingly paid her.”

DW3 RICHARD JOSEPH KIWORI, a young brother to Francis and Michael Joseph Kiwori, and a resident of Mbezi Louis Misigani since 1989, said Michael Kiwori lived uninterruptedly in the land allocated to him by the late Francis Kiwori, before and after his death.

He said Michael Kiwori unexhaustively developed the land a fact that was well known by the plaintiff, the late Francis Joseph Kiwori and the entire family.

He referred to a 2003 clan meeting in Kirua Vunjo, Moshi and Tshs. 150,000/= paid to the plaintiff as a token appreciation.

The witness stated that between 2003 to 2021, no complaint whatsoever was lodged by the plaintiff regarding the disputed land.

On cross examination by Mr. Fred Callist, DW3 said:

“I have been to the disputed land several times. For the last time I visited it 2020. Thereafter I encountered this lack of sight (blindness) difficulty.

Initially the disputed land was "PORI". Francis Kiwori operated a restaurant in Nkurumah Street Dar es Salaam. It was called KANTON RESTAURANT, owned by GEFCO. Francis was the manager.

Francis Kiwori supplied chicken to that restaurant which were reared by the defendant in the disputed land at Kimara.

I was a driver and was transporting those chicken on daily basis from Kimara to Kanton Restaurant. I therefore know very well what arrangements were there between the deceased Francis Kiwori and the defendant.

Michael Kiwori built houses in the disputed farm prior to death of Francis Kiwori. As I knew that the late Francis Kiwori gave part of the farm to the defendant I was not worried to see him developing the farm".

DW4 ZENA HASHIM MOHAMED MAKASAMALA, resident of Mavurunza kwa Mashaka, was born and grew up at Kimara King'ong'o area.

She recalls events of 1970s and 1980s very well particularly when Michael Joseph Kiwori @ Baba Lucy moved to the area and became a neighbor.

The witness is a niece to the late Bibi Buna and remembered an incident when the defendant requested for an access to the main road from the said Bibi Buna.

Explaining how Bibi Buna parted with her land in favour of the defendant, DW4 said:

“4. That I remember the family told Bibi Buna if she desired to give him the access road, the family had no objection. My aunt asked for two pairs of Kitenge, sugar and to be permitted to regularly draw water from the defendant’s water pump, and the defendant dully complied.

5. My aunt gave the defendant a piece of land adjacent to the land in dispute which he later on constructed house whereat he used to run a restaurant and a groceries shop.

6. That on the other remaining parts of the allocated piece of land, the defendant constructed commercial cum residential houses for letting”.

The witness said until her family sold their land in 2013 and relocated to Mavurunza kwa Mashaka, there was no disputed relating to the land given by Bibi Buna to the defendant.

Regarding relationship of Francis Joseph Kiwori and Michael Joseph Kiwori, DW4 said:

“7. That I used to see the plaintiff I used to see the plaintiff’s husband. He used to visit the defendant in the land in dispute. Sometimes the plaintiff’s husband used to visit along with his wife (the plaintiff) and his children or his relatives.

On cross examination by Mr. Fred Callist, DW4 said:

“I was present when the defendant constructed houses in the disputed land. My uncle Mohamed Hassan told me that Francis Kiwori allocated part of the farm to the defendant.

Visits by Francis Kiwori and his family to the disputed land proved to me that Michael Kiwori was the owner of the land”.

On re – examination by Ms. Anna Tupa, DW4 stated that:

“My uncle told me that Francis left the farm to the defendant. I was born in that area and therefore have personal knowledge of all those areas around our home”.

DW5 THOMAS MICHAEL KIWORI, is a patrilineal uncle to Francis and Michael Joseph Kiwori.

As head of the Kiwori’s family, the 73 years old man, said he never received any complaint relating to the land in dispute particularly after the 2003 clan meeting in Kirua Vunjo, Moshi.

He testified that following resolution of the clan meeting the plaintiff was paid Tshs. 150,000/= as token appreciation.

On cross examination by Mr. Fred Callist, DW5 said he was the chairman of the clan meeting held at Kirua Vunjo, Moshi in 2003.

Regarding what transpired in the meeting, DW5 said:

“I personally heard Evarist Joseph Kiwori inform the clan meeting that the late Francis Kiwori gave the disputed land to the defendant”

From the evidence on record, particularly testimonies of five witnesses for the plaintiff and five witnesses for the defendant, it is not disputed that the late Francis Joseph Kiwori bought a parcel of land from Dawson Marco @ Michael Njau whose actual size was not documented.

The sale was reduced to writing and named "HATI YA SHAMBA" dated 4 October 1981 (Exhibit P.2).

Among others, PW4 Fokas John Nyalu, witnessed the sale agreement (Exhibit P.2).

It is equally not disputed that immediately after buying the farm as it then was the late Francis Joseph Kiwori asked his young brother, Michael Joseph Kiwori to move thereto and take good care of it.

The unchallenged evidence of DW3 Richard Joseph Kiwori and DW2 Evarist Joseph Kiwori, is that the deceased and Michael Joseph Kiwori had arrangements regarding the disputed area.

Neither PW1, PW2, PW3, PW4 nor PW5 challenged the evidence given by DW1 Michael Joseph Kiwori, DW2 Evarist Joseph Kiwori, DW3 Richard Joseph Kiwori, DW4 Zena Hashim Mohamed Makasamala and DW5 Thomas Michael Kiwori that the disputed land was well developed by Michael Joseph Kiwori prior to the death of Francis Joseph Kiwori.

If that is a fact, why did Francis Joseph Kiwori not complaint against Michael Joseph Kiwori for almost thirteen (13) years of his occupation and development of the disputed land?

Absence of any misunderstanding between Francis and Michael Joseph Kiwori from 1980 or 1981 to 2003 when Francis Joseph Kiwori passed on, is an indication that whatever arrangements that existed between them worked out.

Records show that for the first time, the plaintiff's claim was raised after death of her husband, Francis Joseph Kiwori on 31 August 2003. Why not before?

DW1, DW2, DW3, and DW5 testified that the plaintiff was compensated for the contribution she made in developing the disputed land.

Contrary to what the plaintiff stated in para.7 of the reply to the Amended Written Statement of Defence, the compensation was not on value of the land but as rightly put by DW2 Evarist Joseph Kiwori, it was based on the ten (10) corrugated iron sheets contributed in constructing a hut.

The plaintiff's silence from 2003 to 2021 when she served a demand letter to the defendant (Exhibit D1) goes a long way to prove that she was adequately compensated as testified by DW1, DW2, DW3 and DW5 and knew that the defendant owned the suit land.

I have also examined Exhibits P.3 and D.2 regarding the estate of the late Francis Joseph Kiwori.

Exhibit P.3 is letters of administration issued by Kinondoni Primary Court in Administration Cause No. 432 of 2012.

The document was issued on 14 February 2013 infavour of Teddy Francis Kiwori @ Theresia Francis Kiwori, the plaintiff herein.

Exhibit D.2 is a judgemtn of Kinondoni Primary Court in Administration Cause no. 432 of 2011.

Two documents (Exhibit P.3 and D.2) appointed the plaintiff as administratrix of the estate of the late Francis Joseph Kiwori.

The Amended Written Statement of Defence and reply to the Amended Written Statement of Defence show that the plaintiff omitted to include the disputed property in the list of properties left by the late Francis Joseph Kiwori. This was after back as 2012 and 2013.

This allegation was not challenged by the plaintiff and subsequently strengthened through testimonies of DW1, DW2, and DW3.

On this note, I entirely agree with the defendant's counsel that based on the evidence of PW5 Mrunge Akilei Macha and DW1, that Francis Joseph Kiwori had sold his land to PW5 and Andrew Mawagali, it was logical for the plaintiff to exclude the disputed land from properties forming part of her late husband's estate.

From the strength of the evidence given by DW1, DW2, DW3, DW4 and DW5 and a fact that for over forty (40) years the defendant has been developing the land in dispute such that ten (10) residential houses were erected thereon, I have no doubt that the late Francis



Joseph Kiwori allocated half of the land he bought in 1980 to the defendant.

In my view taken as a whole, the defendant's evidence is incapable of more than one translation or interpretation, thus the late Francis Joseph Kiwori allocated part (half) of the farm he bought from Dawson Michael @ Marko Njau in 1980 to Michael Joseph Kiwori, and that base on that allocation of 1985, Michael Kiwori had the confidence and audacity to develop his land during the life of Francis Joseph Kiwori and after his death.

The defendant's evidence was corroborated by PW 4 Fokas John Nyalu who admitted that until Francis Joseph Kiwori died, there was no dispute whatsoever over the disputed land.

For the aforesaid reasons, hold as a fact that the disputed property is legally owned by Michael Joseph Kiwori, the defendant herein.

The last issue is what reliefs are parties entitled to:

Mr. Fred Callist, the plaintiff's counsel prayed for the judgment and decree as per the relief clause in the plaint.

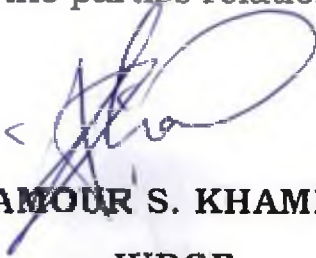
Mr. Lavireen Mussa, learned advocate for the defendant, asserted that the plaintiff is not entitled to any of the reliefs sought because no evidence was led to show that she deserves such reliefs.

It is trite law that in a suit for declaration of rights or character and permanent injunction, the plaintiff will have to substantiate or prove his/her right as claimed thereof.

In the present case, the plaintiff failed to prove her claims and the only remedy available is to dismiss the suit as I hereby do.

From the nature of the parties relationship, I make no order for costs.

It is so ordered.


AMOUR S. KHAMIS

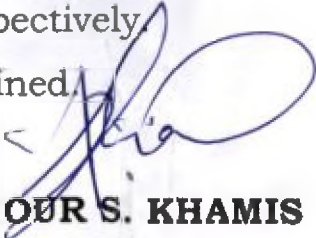
JUDGE

19/08/2022

ORDER

Judgement delivered by way of Video conference in presence of Mr. Fred Callist and Ms. Anna Tupa, learned advocates for the plaintiff and defendant respectively.

Right of Appeal Explained.


AMOUR S. KHAMIS

JUDGE

19/08/2022

