

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 39 OF 2021

SOFIA SALUM ALLY (*Suing as a Legal Person* }
Representative of the Late Kidawa Mohamed Luhanga }**PLAINTIFF**

VERSUS

KURINGE CONTRACTORS LIMITED **1ST DEFENDANT**

EDWARD EUGEN MUSHI *alias known as "KURINGE"* **2ND DEFENDANT**

Date of Last order: 3/06/2022

Date of Delivery: 10/06/2022

JUDGEMENT

AMOUR S. KHAMIS, J.

The overriding question in this matter is whether a person can acquire a better title in land for buying the deceased's property from a non - administrator of the estate.

Sofia Salum Ally is an administratrix of the estate of her late biological mother, Kidawa Mohamed Luhanga who died intestate in Kariakoo area, Dar es Salaam on 23rd September 2006.

In her capacity as legal personal representative of the late Kidawa Mohamed Luanga, Sofia Salum Ally instituted the present case against Kuringe Contractors Limited and Edward Eugen Mushi @ "Kuringe" for vacant possession of a house on Plot No. 25, Block "K", Kongo Street, Kariakoo, Dar es Salaam (C.T No. 183814), payment of Tshs. 210,000,000/= as mesne profits, payment of Tshs. 500,000,000/= as general damages for unlawful interference of her rights over the property and for an order of eviction from the disputed property.

The Plaintiff shows upon death of Kidawa Mohamed Luanga in 2006, she was survived by four children, namely: Mwanahamis Salum Ally, Mohamed Salum Ally, Mtumwa Salum Ally and Sofia Salum Ally.

That through Administration Cause No. 159 of 2013, Magomeni Primary Court appointed Sofia Salum Ally as administratrix of the estate of the late Kidawa Mohamed Luanga on 20 May 2013.

It was alleged that prior to appointment as administratrix of the estate of the late Kidawa Mohamed Luanga, sometimes in the year 2007, Sofia Salum Ally and her siblings: Mwanahamis Salum Ally, Mohamed Salum Ally and Mtumwa Salum Ally entered into a

Joint Venture Agreement with Kuringe Contractors Limited, a company owned and managed by Edward Eugen Mushi @ Kuringe in respect of Plot No. 25, Block "K", Kongo Street, Dar es Salaam.

It was a term of agreement that the first defendant would demolish the then existing residential house and reconstruct a new commercial structure comprising of shop premises, residential rooms, a kitchen and a toilet.

It was also a term of agreement that upon construction of a new structure, Kuringe Contractors Limited and Edward Eugen Mushi @ Kuringe would sublet the shop frames and residential rooms for a period of ten (10) years from 2007 in order to recoup their investment.

It was alleged that upon expiry of the ten (10) years prescribed in the Joint Venture Agreement, in or about the year 2018, Sofia Salum Ally as administratrix of the estate of the late Kidawa Mohamed Luhanga, approached the defendants and sought vacant possession of the property on Plot No. 25, Block K, Kongo Street, Karikakoo, Dar es Salaam.

It was further alleged that to the dismay of the plaintiff, Kuringe Contractors Limited and Edward Eugen Mushi @ Kuringe, blatantly refused to hand over vacant possession of the disputed

house claiming that Edward Eugen Mushi @ Kuringe, had either bought or was in the negotiations to buy the same.

It was averred that the plaintiff's efforts to plead with Kuringe Contractors Limited and or its owner, Edward Eugen Mushi @ Kuringe, proved futile hence institution of the suit.

The Plaintiff further show that following an appointment as administratrix of the deceased's estate, Sofia Salum Ally processed and formalized ownership documents in respect of the deceased's property and subsequently issued with a Certificate of Title No. 183814.

Kuringe Contractors Limited and Edward Eugen Mushi @ Kuringe, filed a Joint Written Statement of Defence disputing the plaintiff's claims and subjecting her to the strictest proof thereof.

In a further reply, the defendants averred that the plaintiff is not entitled to vacant possession of the suit premises on the ground that the same was sold by the plaintiff and her siblings to Edward Eugen Mushi @ sometimes on 22 May 2013.

It was alleged that the sale agreement took place at Magomeni Primary Court at a consideration of Tshs. Four Hundred Million (Tshs. 400,000,000/=).



The defendants disputed occupying the premises unlawfully alleging that the sale agreement was signed by Sofia Salum Ally in her capacity as heir of the late Kidawa Mohamed Luanga and not as administrator of the estate.

The Joint Written Statement of Defence further show apart from the plaintiff, the sale agreement was executed by other heirs of the late Kidawa Mohamed Luhanga: Mwanahamis Salum Ally, Mohamed Salum Ally and Mtumwa Salum Ally.

The defendants pleaded that after Sofia Salum Ally was appointed administrator of the estate of the late Kidawa Mohamed Luhanga, the contract for construction and lease (Joint Venture Agreement) was terminated and parties entered into new arrangements for sale of the suit premises to Edward Eugen Mushi @ Kuringe.

In a further reply, the defendants stated that on 22 May 2013, Sofia Salum Ally and her siblings: Mwanahamis Salum Ally, Mtumwa Salum Ally and Mohamed Salum Ally, negotiated and agreed to sale the suit property to Edward Eugen Mushi @ Kuringe at a consideration of Tshs. Four Hundred Million (Tshs. 400,000,000/=)



The defendants added that the consideration sum, Tshs. 400,000,000/= was to be shared equally to each of the four heirs including the plaintiff.

It was further stated by the defendants that whereas Mwanahamis Salum Ally, Mohamed Salum Ally and Mtumwa Salum Ally were paid Shillings One Hundred Million (Tshs. 100,000,000/=) each, payment to Sofia Salum Ally was deferred pending hand over of a certificate of title and signing of the sale agreement.

The defendants alleged that after successful negotiation of the agreed sale terms, the "*parties*" signed an "*affidavit*" to that effect.

Furthermore, the defendants alleged that sometimes in the year 2018, the plaintiff obtained a certificate of title but refused to hand it over to the second defendant and instead, demanded for a larger share than what was given to other heirs.

In a Reply to the Written Statement of Defence, the plaintiff maintained that the suit property was never sold to any of the defendants and that the plaintiff and her siblings neither swore an affidavit on 22 May 2013 before a magistrate at Magomeni Primary Court nor sold their late mother's house.

The plaintiff specifically disputed contents and authenticity of the signatures purported to be made by heirs of the late Kidawa Mohamed Luanga on the challenged affidavit.

As regards to a sale agreement, the plaintiff expressly refuted the allegation that heirs of the late Kidawa Mohamed Luanga negotiated and or agreed to sale the disputed property to the defendants.

It was stated that at the time of an alleged sale, the plaintiff and her siblings had nothing to sale to the defendants as alleged or at all on account of lack of legal capacity to sale.

In a further reply, the Plaintiff stated that the lease agreement (Joint Venture Agreement) terminated upon expiry of its ten (10) years term and not through signing of a sale agreement.

Furthermore, the plaintiff averred that a purported sale agreement annexed to a Joint Written Statement of Defence was void and non - existent as none of the heirs of the late Kidawa Mohamed Luanga signed it.

Upon completion of pleadings and efforts to mediate parties proved futile, a final pre – trial conference was conducted in which four issues were agreed upon and recorded for determination, namely:



- i) Whether the suit house has ever been sold to the defendants.
- ii) If the response to issue no. 1 is affirmative, whether the sale of the suit premises is legally valid.
- iii) Whether the defendant is unlawfully occupying the suit premises.
- iv) To what reliefs are parties entitled to?

Throughout these proceedings and particularly during trial, the plaintiff was represented by Mr. Jovin M. Ndungi, learned advocate, whilst both defendants enjoyed legal services of Mr. Emmanuel Kessy, a learned advocate of this Court.

At the commencement of trial, the two learned counsel prayed for exclusion of assessors which prayer was granted in accordance to law and having regard to nature of the case.

Trial commenced on 30 May 2022 and came to an end on 3 June 2022 when final submissions were filed. Both sides presented one witness. Whereas Sofia Salum Ally (PW 1) testified for the plaintiff, Edward Eugen Mushi (DW 1) gave evidence for the first and second defendants.

A total of three (3) exhibits were admitted in support of the plaintiff's case and two (2) documents were received in aid of the defendants' case.

During hearing, PW 1 Sophia Salum Ally testified that the disputed property belonged to her late mother, Kidawa Mohamed Luanga who died intestate in the year 2006.

The deceased was survived by four children: Sofia Salum Ally, Mwanahamis Salum Ally, Mtumwa Salum Ally and Mohamed Salum Ally.

Vide Administration Cause No. 159 of 2013 at the Magomeni Primary Court, Sofia Salum Ally was appointed as administratrix of the estate of her late mother on 20/05/2013.

Prior to her appointment as administratrix of the estate, way back in 2017, the four children of the late Kidawa Mohamed Luanga entered into a Joint Venture Agreement with Kuringe Contractors Limited for redevelopment and management of the suit property.

It was a term of agreement that the developer (Kuringe Contractors) Limited would demolish the old structure and erect a new commercial property comprising of shop or business partitions.

PW 1 said the agreement was to run for ten (10) years from 2007 to 2017. During that period, the developer was mandated to lease out the premises in order to recoup its investment and surrender the property upon expiry of the agreement.



Upon expiry of the agreement, she contacted Edward Eugen Mushi, Managing Director of Kuringe Contractors Limited for surrender of possession but he did not yield up.

On further examination by Mr. Ndungi, PW 1 said the defendants refused to hand over the property allegedly because they bought it from the heirs.

She vehemently disputed an allegation of sale to the defendants and produced a certificate of title to prove that the property belonged to the deceased's estate.

On further examination, PW 1 said none of the heirs negotiated for sale or received money from the defendants for the purpose of selling the property.

The witness recalled the meetings she engineered with the defendants in presence of her advocates and a demand letter written by the lawyers on her behalf which did not change the defendants' thinking.

She testified that throughout the time from 2018 to date of her testimony, the property was still in the defendants' possession who rented it out and pocketed all the rent.

She said notwithstanding lack of possession, she dutifully paid land rent and property taxes in respect of the property.

She complained of the loss suffered on account of rent that was solely collected and spent by the defendants at exclusion of the owners.

On cross examination by Mr. Emmanuel Kessy, PW 1 said the Joint Venture Agreement was for redevelopment of a single storey commercial structure which entitled the defendants to lease and collect rent for ten years.

On further cross examination, Sofia Salum Ally said under the agreement, the four siblings were entitled to possession of two shop partitions (rooms) which they could personally occupy or lease out.

The witness added that it was also agreed that the defendants would lease out the two shop premises (rooms) and collect rent on behalf of the plaintiff and her siblings.

On further questioning by Mr. Kessy, PW 1 recollected that initially the defendants collected rent and passed it over to the four siblings as per the agreement but stopped in 2013 when defendants refused to pay any more rent to her and kinfolk.

Asked about a Joint Venture Agreement, PW 1 said after its execution, defendants retained the original document and its photocopy was given to her and the sib.

The witness remarked that a photocopy could not be produced in Court as an exhibit.

PW 1 informed this Court further that she instituted the case as administrator of the estate and insisted none of the heirs sold the property to the defendants.

When shown Exhibits D 1 and D 2, an affidavit dated 20/05/2013 and sale agreement dated 13/06/2013 respectively, the witness rebuffed a signature purported to be hers on the affidavit.

Further, PW 1 challenged a purported sale agreement and said it was not truly signed after her appointment as administratrix of the estate.

On further cross examination, the witness said Exhibit P 2, a certificate of title no. 183814 was issued in 2018.

Questioned on quantum of the outstanding sum due from the defendants, PW 1 said:

"I have no actual amount in respect of the outstanding sum due from the defendants because it is the defendants who know which tenants were leased in the house and at what rent".

On the other hand, DW 1 Edward Eugene Mushi introduced himself as a businessman trading as Kuringe Real Estate Company Limited, dealing in landed properties.

He said the plaintiff was well known to him for over 20 years and recalled to have entered into a sale agreement with her and her siblings.

On examination by Mr. Emmanuel Kessy, DW 1 said the sale agreement was signed in the year 2013.

On further examination, DW 1 stated that the house was sold to him at Tshs. 400,000,000/= and Tshs. 300,000,000/= was paid up front.

He said whereas each of the heir was set to receive Tshs. 100,000,000/=, the plaintiff was destined to receive her portion upon completion of ownership documents.

The witness explained that Exhibit D 1 (affidavit) reflected the initial sale agreement. Subsequently, he prepared a sale agreement signed by three (3) heirs except the plaintiff who failed to surrender a certificate of title.

DW 1 informed this Court that despite of receiving the money, the plaintiff's siblings did not honour the agreement and the plaintiff demanded more than was reserved for her.

On further examination, he said upon an official search, he noticed that a certificate of title was in custody of some lawyers but the plaintiff failed to surrender it to him.

The witness repudiated the plaintiff's claims and prayed for dismissal of the suit with costs.

On cross examination by Mr. Jovin Ndungi, DW 1 admitted that he was in the business of building and renting out premises.

As regards to the disputed property, he said it was bought from the plaintiff's family and handed over to him by Mwanahamis Salum, Mohamed Salum, Mtumwa Salum and Sofia Salum Ally.

Questioned on Kuringe Contractors Limited, the defendants' witness said he was not aware as to who redeveloped the disputed house but the first defendant was a company owned by his relatives, Richard Mboya, Joseph Chuwa and Hilda Soka.

On further cross examination, the witness said the sale agreement was executed after the plaintiff's family obtained letters of administration in respect of their mother's estate.

Asked as to why he insisted on letters of administration before entering into an agreement, DW 1 said that:

"..I have legal knowledge that the deceased's property cannot be sold before an administrator of his/her estate is appointed by a Court.....I bought the disputed house through the heirs."

On further questioning, DW 1 said:

"When I bought this property, the plaintiff's family had not yet obtained letters of administration of their mother's estate. I know that during time of sale of the house to me, Sofia was not yet appointed as administrator of the estate but they were in the process of obtaining letters of administration."

Explaining how the purported sale took place, DW 1 said the sale was orally done and the affidavit (Exhibit D 1) formed an understanding with the sellers.

On contents of Exhibit D 2, DW 1 admitted that the purported agreement did not reflect the spirit of his testimony in Court, thus:

"This agreement did not state that Sofia Salum (PW 1) will be responsible for processing a certificate of title and that will get paid after handing over to me the said certificate of title. I only orally agreed with Sofia Salum that she will hand over the certificate of title to me once it is processed.

I so agreed with her orally when she visited my office. We did not put to writing that agreement with Sofia Salum Ally and her relatives. I do not remember as to when the disputed house was handed over to me. Sofia Salum did not hand over the disputed house in writing to me. We only agreed verbally, not documented."

At the conclusion of trial, parties filed written submissions in support of their respective positions and there is on record the plaintiff's submissions dated 3rd June 2022 filed by Mr. Jovin M. Ndungi and the defendants' submissions of the same date drawn and filed by Ms. Jane Joseph, learned advocate.

I have read through the rival submissions and since they replicate the grounds summarized above, I will not repeat them here. I will therefore go straight to the issues on record and where necessary, relevant parts of the submissions will be referred to.

The first issue is whether the suit house on Plot No. 25, Block "K", Kariakoo, Dar es Salaam has ever been sold to the defendants.

Mr. Jovin Ndungi, learned advocate for the plaintiff submitted that by testimonies of both parties there has never been any sale of the suit property by the plaintiff to the defendants.

Ms. Jane Joseph contended that the suit premises was sold to the second defendant by the plaintiff and her siblings as per testimonies of DW 1 and Exhibits D 1 and D 2.

Sale of land refers to an agreement under which an ownership and possession of land is transferred from the seller (vendor) to buyer (vendee/purchaser) in exchange for specified sum of money or consideration.

Part VIII of **THE LAND ACT No. 4 OF 1999, CAP 113 R.E 2019** deals with land disposition. Section 61 thereof provides that no disposition other than customary right of occupancy can be carried out without complying with the provisions of the Land Act.

The dispositions referred to include a lease, mortgage and right of occupancy. Any such disposition carried outside the provisions of the law shall be ineffectual to create, extinguish, transfer, vary or affect any interest in land.

Section 36(1) of the Land Act considers all dispositions that are not in compliance with requirements of Sections 37, 38, 39 and 40 as void.

In order for a disposition to be effective, it must meet certain requirements which includes to be undertaken on the prescribed forms specified for such disposition (Sections 62(1) and 64(2) of the Land Act No. 4 of 1999).

Further the disposition must be registered under the relevant law unless exempted (Section 62 (2) (3) and (4) of the Land Act) and must be executed by signing it or affixing thumb print or another mark as personal evidence of his/her acceptance save for organizations that may require stamps or seals.

According to Section 64 (1) (a), (b) of the Land Act, Cap 113 R.E 2019, all agreements for disposition of a right of occupancy, derivative right or mortgage, must be reduced to writing or there has to be a written memorandum of its terms.

In the present case, two documents were produced by the defendants to evidence that the disputed property was sold. These are Exhibits D 1 and D 2.

Exhibit D 1 is an affidavit purportedly made by the plaintiff and her siblings: Mwanahamis Salum Ally, Mtumwa Salum Ally and Mohamed Salum Ally on 22nd day of May 2013.

Upon careful examination of this affidavit, I realized that the affidavit plainly contradict DW 1's testimony as to how the alleged sale took place.

Exhibit P 1 is the letters of administration issued by Magomeni Primary Court to the plaintiff on 20th May 2013 in respect of the estate of the late Kidawa Mohamed Luhanga.

During cross examination, DW 1 Edward Eugen Mushi testified that at the time of sale, the letters of administration were not yet issued, a reason that made him buy a property from the heirs.

On further cross examination, he stated that:

"...I know that during time of sale of the house to me, Sofia was not yet appointed as administratrix of the estate but they were in the process of obtaining letters of administration."

Nonetheless, the purported affidavit indicates it was made on 22nd May 2013, two days from date of appointment of the plaintiff as administratrix of the estate.

The affidavit purports to show passport size pictures and signatures of the four heirs of the estate of the late Kidawa Mohamed Luhanga.

Nevertheless, authenticity of that document was onslought in the Plaintiff's Reply to a Joint Written Statement of Defence, thus:

"2. That the contents of paragraphs 2 and 4 of the Written Statement of Defence are disputed and the plaintiff maintains that the suit property has never been sold to any of the defendants. It is further averred that the plaintiff together with her siblings have never sworn an affidavit on 22nd May 2013 before the Primary Court Magistrate at Magomeni Primary Court to sell their late mother's suit property. The affidavit

annexed to written Statement of Defence as KUR 1, its contents and signatures appended thereto are also disputed and the defendants are put to strict proof thereof."

Whereas PW 1 categorically disputed authenticity of an alleged signature of hers, the defendants did not produce other heirs and a magistrate before whom the document was purportedly made to prove legitimacy of an alleged affidavit.

The affidavit was reputedly affirmed before a magistrate at Magomeni Primary Court. Yet, for no apparent reason, he/she was neither summoned nor enlisted as a witness to prove an ostensibly signature and stamp of the Court.

Related to this is Exhibit D 2. This is a purported sale agreement between Sofia Salum Ally, Mwanahamis Salum Ally, Mtumwa Salum Ally and Mohamed Salum Ally as heirs of the late Kidawa Mohamed Luhanga and Edward Eugen Mushi in respect of the disputed property.

The agreement was allegedly signed by the parties on 13 June 2013 before advocate Francis Makota of P.O. Box 11045 Dar es Salaam. However, it was not signed by Sofia Salum Ally (PW 1) whose passport size photograph was also not affixed on it.

Whereas, the agreement was allegedly signed on 13 June 2013, about 43 days after issuance of the letters of administration, it referred to the sellers as heirs of the late Kidawa Mohamed



Luhanga and abnormally kept silent on appointment of Sofia Salum Ally as administratrix of the estate.

An apparent question that features is whether, the purported three (3) heirs were legally mandated to sale the property to the second defendant.

According to Section 99 of the **PROBATE AND ADMINISTRATION OF ESTATES ACT, CAP 352, R.E 2019**, an executor or administrator, as the case may be, of a deceased's person is his legal representative for all purposes, and property of the deceased person vests in him/her as such.

Under Section 101 of that Act, an executor or administrator has, in respect of the property, powers to dispose of movable property as he thinks fit, and powers of sale, mortgage, leasing of and otherwise in relation to immovable property of the deceased in accordance to law.

One can rightly argue that the plaintiff's appointment was not made in accordance to the provisions of the Probate and Administration of Estates Act (supra). That is correct, she was appointed by a Primary Court.

Part II of the Fifth Schedule to the **MAGISTRATES COURTS ACT, CAP 11, R.E 2019** provides general duties of administrator of the deceased's estate which includes to collect property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of the administration and shall thereafter distribute the estate of the deceased to the persons or

for the purposes entitled thereto, and in so doing, shall give effect to the directions of the Primary Court.

Administrator of the estate is equally empowered to bring and defend proceedings on behalf of the estate.

In **MOHAMED HASSAN V MAYASA MZEE AND ANOTHER (1994) TLR 225**, the Court of Appeal addressed powers of administrator of the estate appointed by the Primary Court and held that once an administrator of the estate was appointed then the house of the deceased owner of the property is changed in all documents and that of the administrator is substituted and is left to his discretion on (how) to administer the estate in the best way he can.

There is no doubt that the administrator's mandate to deal with properties of the deceased in the best way possible includes the power of sale.

In the present case, the sale agreement was purportedly signed by three (3) heirs who, even assuming that they truly signed the document, were not vested with authority to dispose of the property in dispute.

In such circumstances, the purported sale agreement was void ab initio in all respects.

Apart from that, the sale agreement was heavily attacked in a Reply to the Joint Written Statement of Defence in which the plaintiff averred:

“3. That as regards to the contents of Paragraph 3 of the Written Statement of Defence, the plaintiff disputes execution of the purported sale contract by neither herself nor any of the siblings and puts the defendants to strict proof thereof.....”

In view of this criticism, naturally and bearing a legal duty to prove its existence, the defendants were expected to cause appearance of advocate Francis Makota who allegedly witnessed Mwanahamis Salum Ally, Mtumwa Salum Ally and Mohamed Salum Ally sign the document, to prove that the trio truly executed the agreement and it was authentic.

Personal testimonies of the said Mwanahamis Salum Ally, Mtumwa Salum Ally and Mohamed Salum Ally were also vital in this case because their names, pictures and supposedly signatures appears on the disputed affidavit and sale agreement (Exhibits D 1 and D 2).

Section 112 of **THE EVIDENCE ACT, CAP 6, R.E 2019** provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence.

In the present case, the defendants wishes this Court to believe that the disputed property was sold to the second defendant by heirs of the late Kidawa Mohamed Luhanga. The onus of proof thus lies on them to prove that allegation.

In this line, I am persuaded by the High Court of Kenya in **PETERSON GUTU ONDIEK V DANIEL NJIGUA GICHOHI, CIVIL**

CASE NO. 4018 OF 1990 (unreported), wherein it was held that where evidence exists and the same is not adduced in Court, the Court may presume that it is unfavourable to a party withholding it.

I am therefore not convinced that the plaintiff and her three sib negotiated and or sold the disputed property to any of the defendants.

I am further convinced from the evidence on record, that Exhibits D 1 and D 2 did not authentically reflect documentation of the parties' terms and conditions for sale of the disputed property to the second defendant.

The third issue is whether the defendants unlawfully occupies the suit premises. In my view, this issue can be conveniently integrated with the fourth and last issue which is on the reliefs that parties are entitled to.

Associated with these issues is a question that featured in the proceedings relating to existence of a Joint Venture Agreement for redevelopment of the disputed property.

During examination in chief, DW 1 Edward Eugene Mushi, stated that the parties' original encounter was purely sale of the house and nothing more.

On cross examination by Mr. Jovin Ndungi, Edward Eugen Mushi disassociated himself from Kuringe Contractors Limited describing it as a company owned by Richard Mboya, Joseph Chuwa and Hilda Soka.

On further cross examination, DW 1 said he was not responsible in redevelopment of the disputed property and added that:

"The single storey house on that plot in dispute was already constructed when I bought the disputed house. I do not know a person who built that house I currently occupy and lease out."

This testimony was made after PW 1 Sofia Salum Ally informed this Court on existence of a Joint Venture Agreement, thus:

"....In the year 2007, Edward Kuringe and us as heirs of our mother's estate, entered into a Joint Venture Agreement for the redevelopment of our suit house. The agreement was to run for ten (10) years only. The agreement required Kuringe Contractors to build a single storey building (not a multi storey) building comprising of shop frames and operate them for ten (10) years to recoup his investment. After lapse of ten (10) years, the defendant was required to return (handover) vacant possession of the property to us. The agreement ran from 2007 to 2017 and expired....."

PW 1's testimony reflected contents of Paragraph 6 and 9 of the Plaint which were responded to by the defendants in a Joint Written Statement of Defence, thus:

“3. That the contents of paragraphs 5, 6, 7 and 8 of the Plaintiff are noted. The defendants further avers that the said contract was signed by the plaintiff under his personal capacity as the heirs of the late Kidawa Mohamed Luanga together with his fellow other beneficiaries and not as administrator of estates. It is further stated by the defendants that after the plaintiff was appointed administrator of the estate, the said contract for construction and lease was terminated and parties entered into another arrangement for the sale of suit premises to the 2nd defendant.”

Existence of a Joint Venture Agreement which was also referred to as an agreement for construction and lease was further recognized in Exhibit D 2, a purported sale agreement in which it was stated that:

“2. Kwamba nyumba husika ilikuwa kwenye mkataba wa uwekezaji baina ya wauzaji na kampuni ya Kuringe Contractors Ltd ambayo mnunuzi ni Mkurugenzi wa kampuni hiyo. Hivyo mkataba huu unavunja mkataba wa awali wa uwekezaji.”

In **MOHAMED BIN BASITY V C CUTMORE (1951) 2 LRK 101** it was held that a party is bound by his pleadings notwithstanding the evidence.

In the present case, DW 1 testified contrary to contents of his own Joint Written Statement of Defence and contents of Exhibit D

2, a document tendered by himself as shown above, and thus inviting this Court to have a reasonable suspicion on his testimony!

Based on discrepancy of his testimony in comparison to the pleadings and other evidence on record, DW 1 is not a reliable witness.

In ***ALLIANCES STEEL WORKS LTD V COSMOS MILLERS LTD, CIVIL CASE NO. 846 OF 1999*** (unreported), the High Court of Kenya persuasively held that where the plaintiff's evidence is direct and personal as opposed to the defendant's, the Court would believe the plaintiff's case.

On strength of the above analysis of the evidence on record and stated legal position, I am satisfied that defendants and heirs of the late Kidawa Mohamed Luhanga entered into an agreement for construction (re-development) and lease of the disputed property (Joint Venture Agreement) which lasted from 2007 to 2017.

In Paragraph 4 of the Complaint, the plaintiff averred that her claim against the defendants jointly and severally was for delivery of vacant possession of the disputed property, payment of Tshs. 210,000,000/= in the account of mesne profits and Tshs. 500,000,000/= as general damages for unlawful interference with her property's rights. Lastly, she claimed for an order of eviction against the defendants from the disputed property.

The same prayers were repeated in the prayer clause of the Plaintiff and three more items were added: interest at commercial rate for unpaid rentals for the year 2017, interest on the decretal amount at Court's rate and costs of the suit.

The underlying principle on which the Civil Procedure Code functions is that where there is right there is remedy (*ubi jus ibi remedium*).

The concept of mesne profits has been developed from this principle because it is the law of nature to provide right to compensation where there has been an infringement or breach of a legal right.

Section 3 of **THE CIVIL PROCEDURE CODE, CAP 33 R.E 2019** defines "*mesne profits*" of property to mean those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received there from together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

Order XX Rule 12 of **THE CIVIL PROCEDURE CODE** lays down a provision for the passing of the decree by a competent Court where there exists a suit for recovery of immovable property's possession, rent and mesne profits.

The said provision partly states that where a suit is for recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree for the possession of the property or declaring an entitlement as against the Government to possession of the property.

It is further provided that the Court may pass a decree for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.

The Court may also direct an inquiry as to rent or mesne profits from the institution of the suit until delivery of possession to the decree holder, the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court or the expiration of three years from the date of the decree, whichever event first occurs.

Going by the above provision, it is clear that there exists no fixed rule for assessing mesne profits. Therefore the scope for assessment of mesne profits has been left in the hands of the courts.

In **SMT SUBASHINI V S. SANKARAMMA, CIVIL REVISION PETITION NOS 7005, 7017, 7022, 7106, 7107 & 7108 of 2017** the High Court of India at Telengana highlighted the objective behind awarding mesne profits.

It observed that mesne profits play a role of compensating the original owner of a property who has suffered loss and damages because of unauthorized possession of the same property by some other person.

The term compensation is applied to put emphasis on the fact that a person has been deprived of the right to the enjoyment of his property and the loss suffered by a lawful owner.



Therefore, the idea behind granting of mesne profits is to rectify a wrong that has taken place.

In **NAZIR MOHAMED V J. KAMALA AND OTHERS, APPEAL NOS. 2843 - 2844 OF 2010**, the Supreme Court of India observed that a decree of possession of immovable property does in no way follow a decree of declaration of ownership automatically. The burden of justifying the allegation of wrongful possession exists solely on the plaintiff.

In the present case, PW 2 Sofia Salum Ally testified that upon expiry of the Joint Venture Agreement in 2017, the defendants adamantly refused to hand over vacant possession of the demised premises.

She further testified that on allegation of purchase, the defendants continued to lease out the property for their own benefits.

This fact was conceded by the defendants through testimony of DW 1 who on cross examination, said that:

"...the disputed house is in my custody until now...."

I am therefore satisfied that despite of expiry of a re-development and lease (Joint Venture) agreement in the end of the year 2017, the defendants continued to occupy the disputed property by leasing it out to various tenants.

In clause (b) of the prayer clause in the Plaint, the plaintiff pleaded that Tshs. 210,000,000/= was the equivalent of three

annual rentals at the prevailing market rates for similar premises for the years 2018, 2019 and 2020.

That fact was re - echoed by PW 1 while on cross examination by Mr. Emmanuel Kessy.

In **TANZANIA SEWING MACHINE CO. LTD V NJAKE ENTERPRISES LTD, CIVIL APPEAL NO. 15 OF 2016** (unreported), the Court of Appeal was called upon to determine a claim of mesne profits that the appellant company suffered.

In assessing the evidence on record, the Court of Appeal made reference to its earlier decision in **ABDUL HAMAD MOHAMED KASSAM AND ABDULATIF I. MURUKDER V AHMED MBARAKA, CIVIL APPEAL NO. 42 OF 2010** (unreported) and underscored that in law mesne profits is calculated on the basis of the rent payable at the material time.

Further, the Court of Appeal was satisfied that lease agreements that could prove rent payable were not exhibited in Court to prove the quantum of mesne profits.

That notwithstanding, the apex Court captioned that it was undisputed that the respondent had indeed occupied the property and collected rent therefrom.

Based on that finding, the Court of Appeal awarded mesne profits to the appellant on the ground that the respondent was entitled to account for the rent collected during its occupation of the suit property.

Further the apex court emphasized that:

“There are two reasons why we think that Mr. Rweyongeza is entitled to demand the respondent to pay mesne profits obtained during respondent’s occupation of the suit property. First, the respondent’s director PW 5 has conceded that rent was actually collected during the respondent’s occupation. We think, the obligation to account for the rent that was collected is placed on both the appellant and respondent as well.Therefore the respondent company had no justification to occupy and collect rent for six to seven years when it had not performed its obligation....”

In the present case, apart from admitting that he is in possession of the disputed property from 2018 and collects rent therefrom to date, DW 1 did not account for such collected rent or give alternative figures against those given by the plaintiff through PW 1.

In the circumstances, I am satisfied that the plaintiff is entitled to mesne profits as claimed.

Since Tshs. 210,000,000/= asserted covered a period of three years up to a date of filing the suit (December 2020). From that simple arithmetic, in each year, the appellant was entitled to payment of Tshs. 70,000,000/ in the account of mesne profits.

Counting from 1st January 2018 to date of delivery of judgment (June 2022), the respondent has been in unlawful occupation for four (4) years and almost six (6) months.

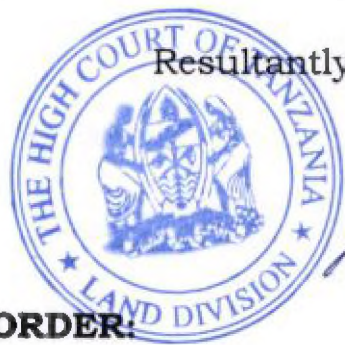


It follows that during such period of four (4) years and six (6) months, the amount of mesne profits payable to the appellant is Tshs. 315,000,000/=.

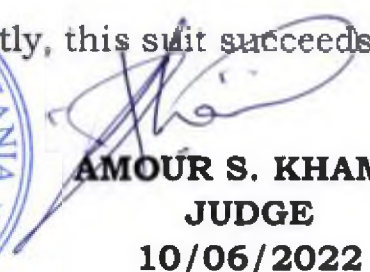
Apart from mesne profits, this Court finds that the plaintiff is entitled to the following reliefs:

- i) Payment of interest by the respondent on the decretal amount at the rate of seven percent (7%) from date of Judgment to date of full payment.
- ii) The defendants should immediately vacate from the disputed land and handover vacant possession thereof to the plaintiff.

- v) Costs of the suit.



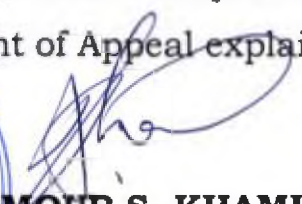
Resultantly, this suit succeeds. It is so ordered


AMOUR S. KHAMIS
JUDGE
10/06/2022

ORDER:

Judgement delivered in chambers in the presence of Mr. Jovin Ndungi, advocate for the plaintiff and holding brief of Mr. Emmanuel Kessy for the defendants. The plaintiff is also present in person alongside Ms. Jane Joseph, Legal Officer of the first defendant company Right of Appeal explained.




AMOUR S. KHAMIS
JUDGE
10/06/2022