

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 116 OF 2020

BHARAT PURSHOTTAM 1ST PLAINTIFF

SUDHA PRAVIN PURSHOTTAM 2ND PLAINTIFF

VISHAK GILESH PURSHOTTAM 3RD PLAINTIFF

NILMA RAJESH PURSHOTTAM 4TH PLAINTIFF

VERSUS

ARTI KETAN MOKHA..... 1ST DEFENDANT

KAMINI NANALAL 2ND DEFENDANT

JUDGMENT

Date of last Order: 24.08.2022

Date of Judgment: 19.09.2022

A.Z. MGEYEKWA, J

At the centre of controversy between the Plaintiffs, and Defendants in the
Plaint lodged on 06th July, 2020, and the Defendants lodged a Counter
Claim lodged on 11th May, 2022 over the same landed property, Plot No.
4 Block 7 Mchikichi Street, Kariakoo with C.T. No. 94402 Land Office No.

399272. The Plaintiffs prays for Judgment and Decree against the Defendant as follows: -

- a) *Judgment in favour of the plaintiffs against the defendants jointly and severally for a declaratory order that the plaintiffs are the exclusive and registered owners over the suit property under plot No. 4 Block 7 Kariakoo with C.T. No. 94402 Land Office No. 399272 by 20% shares each arising from inheritance vide Probate and Administration No. 194 of 1997.*
- b) *A declaratory order that the defendants have no any inheritance interest/right over the suit property.*
- c) *A permanent and perpetual injunction against the defendants for interference and or harassment towards the peaceful enjoyment of the suit property by themselves and or their agents and or whomsoever acting on their behalf.*
- d) *General damages to be assessed by the court*
- e) *Such further orders or reliefs this Hon. Court deems just, equitable and convenient;*
- f) *The defendants to be ordered to pay the costs of this suit.*

On the other hand, in Counter Claim, the Plaintiffs prays for the following:-

- a) *A declaration that the property on Plot No. 4, Block 7, Certificate of Title No. 94402, Land office No.399272, Kariakoo Area, Dar*

es salaam is part of the estate of the deceased Purshottam Ishwarlal.

- b) A declaration that the plaintiffs in the Counter Claim being one of the children of the deceased Purshottam Ishwarlal are entitled to a share(s) of the properties of his estate which include the property over plot No. 4, Block 7, Certificate of Title No. 94402, Land office No. 399272, Kariakoo area, Dar es salaam.*
- c) Declaration that the acts of the defendants in Counter Claim to discriminate and/or segregate the plaintiffs in Counter Claims based on their gender by excluding them in the distribution of the estate of the deceased Purshottam Ishwarlal is discriminatory, illegal, and/or unlawful.*
- d) For orders of permanent injunction restraining the defendants in the Counter Claim on their own, agents, workmen and/or employees or any person whatsoever acting on their instructions from interfering with the management and or the dealing with properties of the deceased Purshottam Ishwarlal including the said property on plot No. 4, Block 7, Certificate of Title No. 94402, Land Office No. 399272, Kariakoo area, Dar es salaam.*
- e) Costs of the suit and this Counter Claim.*
- f) Any other order(s) and relief(s) may this Honourable Court deem it and just to grant.*

The facts, as can be deciphered from the pleadings and evidence on record go thus: the Plaintiffs are claiming that they are the lawful owners of the suit landed property described as Plot No. 4 Block 7 Kariakoo with C.T. No. 94402 Land Office No. 399272 registered on 28.05.2012 as per Exhibit P6, the four Plaintiffs and two Defendants are biological brothers and sisters. Their father is the late Purshottam Ishwarlal.

According to the Plaintiffs, it is alleged that the Plaintiffs obtained ownership of the suit property by way of inheritance through Probate and Administration No. 194 of 1997 resulting from the demise of the late Rajesh Purshottam and Pravin Purshottam whereas the said Plot No. 4 Block 7 Kariakoo with C.T. No. 94402 Land Office No. 399272 was distributed among the four brothers of the deceased at 20% each, under the supervision of Pravin Purshottam who was appointed the administrator of Rajesh estates.

On 12th May, 2022 the Defendants filed a Counter Claim disputing the claims on the ground that the said Plot No. 4 Block 7 Kariakoo with C.T. No. 94402 Land Office No. 399272 was part of the estates of their late father Purshottam who died interstate in 2005, hence that the two daughters were also entitled to the shares of their late father estates.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brother Maige, J (as he then was), I thank my

predecessor for keeping the records well and on track. I thus gathered and recorded the Plaintiff and Defendants' case and now I have to evaluate the evidence adduced by the witnesses to determine and decide on the matter in controversy.

Following the Court order made on 2nd August, 2021 the Court invoked its power under Order XIX Rule 1 of the Civil Procedure Code Cap. 33 [R.E 2019] and ordered the facts of this case be proved by an affidavit. The Plaintiffs and Defendants were ordered to file affidavits of his witnesses before or by 17th August, 2021, cross-examination and tendering of documents was scheduled on 24th August, 2021.

At all the material time, the Plaintiff was represented by Mr. Erick Simon, learned Advocate while the Defendant had the legal service of Mr. Seni Malimi and Christabella Madembwe, both learned Advocates. During the Final Pre-Trial Conference, four issues were framed for determination as follows: -

1. *Whether the suit property belongs to the plaintiffs.*
2. *If the answer to issue No. (1) is answered in the negative, whether the suit property belongs to the estate of the late Purshottam Ishwarlal.*
3. *Whether the Counter Claim is time-barred.*
4. *What reliefs are parties entitled thereto.*

In what seemed to be a highly contested trial, the Plaintiff called four witnesses and the Defendants paraded three witnesses. The Plaintiff's case was founded on Mr. Bharat Purshottam (PW1), Sudha Pravin Purshottam who testified as PW2, Vishak Giles Purshottam (PW3), and Nilma Rajesh Purshottam (PW4). The Defendants' case was found on Arti Ketan Mokha who testified as DW1, Kamini Nanalal (DW2), and Satish Purshottam who testified as DW3.

The Plaintiff tendered a total of ten (10) documentary exhibits; PW1 Witness statement (Exh.P1), Transfer of a Right of Occupancy Exh.P2), Transfer of a Right of Occupancy (Exh.P3), Transfer of a Right of Occupancy (Exh.P4), *Usimamizi wa Mirathi* (Exh.P5), Certificate of Title No. 94402 (Exh.P6), Barua ya Wito dated 29.06.2020 (Exh.P7), Witness Statement Sudha (Exh.P8), Witness Statement of Nilma (Exh.P9), Witness Statement of Vishak (Exh.P10).

On the other hand, the Defendants adduced in support of their testimony against the Plaintiff's case, tendered twelve (12) Exhibits namely; Deed of Variation of Agreement (Exh.D1), Passport (Exh.D2), Memorandum of Marriage (Exh.D3), Witness statement (Exh.D4), *Usimamizi wa Mirathi* (Exh.D5), a letter dated 15.03.2018 (Exh. D6), a letter dated 19.03.2018 (Exh.D7), a document of water chargers (Exh.D8), Kamini Witness

Statement (Exh.D9), Satish Witness Statement (Exh.D10), Deed of Agreement (Exh.D11) and Deed of Variation of Agreement (Exh.D12).

The Plaintiffs in their pleadings, evidence made through their witness statements and cross-examination testified that they are lawful registered owners of the suit property Plot No. 4 Block 7 Kariakoo with C.T. No. 94402 registered on 28.05.2012, Land Office No. 399272, and each owing owning 20% shares of the whole property.

Furthermore, in accordance with the facts of the case, the suit land was originally owned by their two brothers namely Rajesh Purshottam and Pravin Purshottam who equally purchased the said suit property in 1984 at the tune of Tsh. 150,000/= from one Ally Mohamed. To support their evidence they tendered exhibit P2. As per paragraph 7 of the Plaint, Rajesh Purshottam and Pravin Purshottam each of them owned 50% of the suit land.

After the death of Rajesh Purshottam in 1994, the surviving co-owner Pravin Purshottam applied for letters of administration of the same, in which he was appointed to administer the estate of the late Rajesh Purshottam, upon such appointment he distributed the suit property into 20% shares among the deceased's beneficiaries hereinafter four Plaintiffs and Satish Purshottam (DW3) whereas later the said suit property was registered into their individual names as follows; Pravin Purshottam,

Bharat Purshottam, Giles Purshottam, Satish Purshottam and Nilma Rajesh, the daughter of the late Rajesh as per Certificate of Title No. 94402 (Exh.P6).

Moreover, the two daughters; Arti Ketan Mokha and Kamini Nanalal were excluded from inheriting the estates of their brother Rajesh because Rajesh before his death had left an affidavit bequeathing the suit property to the Plaintiffs in exclusion of the two Defendants. The main reason for excluding them is because the two daughters were grown up and were to form families as per paragraph 7 of the Plaint, (Exh.P5) and (Exh.P4).

Moreover, the suit property did not form part of the estate of their late father Purshottam Ishwarlal, because Purshottam Ishwarlal was neither a registered owner of the suit property nor purchaser of the suit property and the plaintiffs in Counter Claim were not able to prove ownership of the suit property to their late father Purshottam Ishwarlal, However, the late Purshottam Ishwarlal was involved in the distribution of the estates of the late Rajesh in Probate and Administration No. 194 of 1997 as per exhibit P4 before he passed away in 2005. The Plaintiffs testified to the effect that Purshottam Ishwarlal the lawful owner of the suit land; could have challenged the said Administration of the Estates of the late Rajesh.

On the other side, the evidence of the Defendants were completely comparable. Both testified that the suit property belonged to their late

father Purshottam Ishwarlal who died in 2005, however, the suit property was registered in the names of their two elder brothers; Rajesh Purshottam and Pravin Purshottam. In their testimonies, they stated that in accordance with Hindu customs, elder brothers control the entire family and take care of the rest using the family properties.

The Defendants further contended that the suit property did not belong to the late Rajesh Purshottam nor Pravin Purshottam because the beneficiaries includes the deceased's children and widows. They testified to the effect that Pravin Purshottam and Radish's daughter were not registered as the lawful owners of the suit premises which were registered on 28.05.2012. In their testimonies, they testified to the effect that it is doubtful as to how the co-owner and the primary heir of the deceased were left out in inheriting the suit premises situated in Plot No. 4 Block 7 Kariakoo with C.T. No. 94402 Land Office No. 399272.

In cross-examination, the Defendants admitted that their father was still alive in 1997 and that was involved as guardian of Nilma who was a minor. DW1 and DW2 testified that they did not know how their father acquired the suit property, however, they insisted that their elder brothers in 1984 were still young with no income to purchase the said suit property at the tune of Tsh. 150,000/=. The Defendants insisted that their late father bought the suit premises and vested power to the elder brothers. DW1

and DW2 further testified that it is not clear why only two sisters were excluded from inheriting the estates of their brothers.

Moreover, after a long fight for their rights in different authorities, DW1 and DW2 opted to apply for letters of administration of their father's estate in Kariakoo Primary Court in Probate Cause No. 53/2018 whereas on 26th July, 2018 both defendants were appointed administratrix of the Estates of the late Purshottam Ishawarlal Alarana as per **exhibit D5**. Satish Purshottam (DW3), one of the five brothers who allocated 20% shares of the suit property as an inheritance from their late brother Rajesh testified in favour of the two sisters excluded, that there was no reason to exclude their two sisters in distributing the suit properties, however, that the two sisters are entitled to share on the suit property.

Having heard the testimonies of both parties and considering the final submission of the learned counsel for the Plaintiff, I should state at the outset that, in the course of determining this case I will be guided by the principle outlined in civil litigation and which will guide this Court in the course of determining this suit. Section 110 of the Evidence Act, Cap.33 [R.E 2019] places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. Section 110 (1) of the Act provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Similarly, in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 it was held that *“he who alleged must prove the allegations”*.

From the foregoing, let me now confront the issues framed for the determination of the present dispute between the parties. In addressing the first issue *whether the suit property belongs to the Plaintiffs..*

The analyses of this issue show that the parties herein lock horns on who is the lawful owner of the suit land between the Plaintiff and the late Pushorttam. In a chronological account of the ownership of the property the Plaintiffs presented; their evidence to the effect that the late Pravin and Rajesh were the lawful owners of the suit land. To substantiate his testimony, PW1 tendered the Deed of Transfer of Right of Occupancy for Plot No. 4 Block No. 7 Mchikichi Street, Kariakoo Area at Dar es Salaam (Exh.P2) the documents show that Pravin Purshottam and Rajesh Purshottam bought the suit property in 1984. Also, PW1 tendered a Transfer of Right of Occupancy for Plot No. 4 Block 7 Mchikichi Street, Kariakoo at Dar es Salaam (Exh.P4 collectively) which arises from the estate of Rajesh Purshottam in Probate and Administration Cause No. 194 of 1997 (Exh.P4). The late Pravin was appointed to administer the

estate of the late Rajesh signed by the late Pravin Purshottam, Bharat Purshottam, the late Gitesh Purshottam, Sattish Purshottam Nilma Rajesh, and the late Purshattam Ishwarlal Rana as Guardian of Nilma Rajesh.

It is doubtful if Purshottam Ishwarlal was the owner of the suit land because there are n no any documents related to the suit premises. Had he been the lawful owner he could not sign the transfer Deed whereas the said suit premises was transferred to the beneficiaries. Besides, there was no any objection raised by the late Purshattam Ishwarlal nor the Defendants in regard to the transfer Deed.

The Plaintiff also tendered a Transfer of Right of Occupancy in respect to Plot No. 4 Block 7 Mchikichi Street, Kariakoo at Dar es Salaam which arises from the estate of Pravin Purshottam in Probate and Administration Cause No. 194 of 1997 (Exh.P3), the said transfer deed was signed by the late Pravin Purshottam, Bharat Purshottam, the late Gitesh Purshottam, Sattish Purshottam, and Nilma Rajesh.

PW1 also tendered, Form No. 4, Application for the administration of the estate, Application by legal personal representative dated 29.04.2017, and Assent to the bequest dated 29.04.2017. However, the relevant document to prove ownership of the suit premises was an original Transfer of Right of Occupancy dated 26. 01.1998 (Exh.P4), Certificate of

Title which was admitted as exhibit P6. The Certificate of Title indicates that it was registered for the first time on 28.05. 2012 whereas in 2017 the same was registered in the names of the individual beneficiaries of the deceased such as Bharat Purshottam, Vishak Gilesh, Sudha Pravin Purshottam, Nilma Rajesh Purshottam, and Satish Purshottam.

The Defendants in their testimonies submitted in length on the issue of Purshottam inheritance and faulted the probate procedure. However, the Defendants in their testimonies did not prove that the suit property belonged to their late father Purshottam Ishwarlal. It was upon the Plaintiffs in Written Statement of Defence and Counter Claim to prove their allegations that the suit property really belonged to their late father. **Sections 110(1), (2), 111, and 112 of the Law of Evidence Act, Cap. 6 [R.E. 2019]** provides that:-

'110. (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.'

Equally, in the case of **Agatha Mshote v Edson Emmanuel and 10 Others**, Civil Appeal No. 121 of 2019 the Court of Appeal held that

'...since the burden of proof never shifts to the adverse party until the party, on whom the onus lies discharges that burden, as earlier stated, the weakness of the respondent's case if any, cannot salvage the plight of the unproven appellants' case'

Yet again, the defendants did not object to the appointment of administration of the estate of the late Rajesh and Pravin, PW1 was appointed to administer the estate of the late Pravin Purshottam and the estate included the suit premises but the parties did not raise any concern or objection. In the case of **Amina Maulid & 2 others v Ramadhani Juma**, Civil Appeal No. 35 of 2019, the Court of Appeal of Tanzania at Mwanza CAT held that:-

*"the act of registration confirms transactions that confer, affect or terminate that ownership or interest. Once the registration process is completed, no search behind the Register is needed to establish a chain of Titles to the property, for the register itself is conclusive proof of the title.... **the appellant has argued that registration in the***

name of the respondent was done fraudulently. That is an allegation that ought to have been proved through cogent evidence at the trial and it ought to have involved the filing of a Counter Claim and joining of the relevant authority which was responsible for the registration of the plot in the name of the respondent. As it stands, the available evidence on the record supports the finding of the learned trial Judge that the respondent is the lawful owner of the suit property..." [Emphasis added].

Applying the above except in the instant case, it is vivid that the Defendants' claims that the Plaintiffs' transfer of the Certificate of Occupancy to the beneficiaries was done fraudulently cannot hold water since the authorized authority responsible for the registration of the Deed of Title was not called to testify in Court to prove the Defendants' claims. Therefore, the only evidence on the record supports the testimonies of the Plaintiffs that they are the lawful owners of the suit premises.

The Defendants banked a lot on a TRA document '*Taarifa ya Malipo ya Kodi Purshottam Ishwarlal Rana*' (Exh.D7), however, it is a fact Purshottam Ishwarlal passed away in 2005, thus, it is obvious that exhibit D7 does not mean that the late Purshottam Ishwarlal paid the property tax after his death. Again, it is a fact that exhibit D7 does not prove ownership. I expected the Defendants to tender a Certificate of Title of Purshottam

Ishwarlal. However, they did not tender any documentary evidence to prove Purshottam Ishwarlal's ownership over the suit land.

The issue raised by Mr. Malimi that exhibit 11 was executed in September, 2017 and the family ownership ceased and each member was to own her share in the property separately. In my considered view, I hold that it is not the concern of the Defendants at this juncture to raise such concern, because the same is raised in the wrong forum.

The learned counsel for the Defendants in his written submission submitted in length the issue of gender discrimination with regard to inheritance of land. To support his position the learned counsel cited the case of **Ephraim v Holaria Pastory and Another**, PC Civil Appeal No. 70 of 1989 (unreported) [1990]. In the case of **Ephraim v Holaria Pastory** (supra), this Court washed away the discrimination between males and females in inheriting the land. In my view, the cited case is distinguishable from the instant case. It is worth noting that this court is tasked to determine land matters only. Therefore, the issues of inheritance or probate cannot be determined by this court. The same is raised in the wrong forum. The Defendants have no forum at this Court on a matter involving the inheritance of their late father. The principle was well articulated by the Court in the cases of **Mbaraka Selemani v. Nuungano**

Selemani, Land Appeal No. 17 of 2008, HC –Land Division, Hon. Maghimbi, J held that:-

“The Chairman had no jurisdiction to determine probate matters”

See also the case of **Hadiia Said Matika v Awesa Said Matika**, PC Civil Appeal No. 2/2016, HC at Mtwara. Thus, in my considered view, this ground suffers from the wrong forum crunch that renders it utterly untenable.

Additionally, the Defendants tried to prove that their late father, Purshottam Ishwarlal was the owner of the suit land by showing that he was paying water bills and land rent in his name until 2013. This argument does not prove ownership of land since there is no any cogent documentary evidence to prove that late Purshottam Ishwarlal bought the suit land in the first place. As rightly pointed out by Mr. Erick, counsel for the Plaintiff that the evidence of DW1, DW2, and DW3 cannot override the evidence and documentary evidence of the Plaintiffs which proves that the original owners were Pravin Purshottam and Rajesh Purshottam. In the case cited by Mr. Erick the Court of Appeal of Tanzania in the case of **Agatha** (supra) held that:-

"Since the disposition was reduced into writing it could not be overridden by an oral account. This is as per the dictates of section 100 (1) of the Evidence Act."

Based on the above authority, the Defendants cannot defeat the disposition of the suit premises which was done by the authorized authority and all procedure was adhered to.

The issue is that the late Pravin Purshottam and the late Rajesh Purshottam were at a young age and had no income to prove their income cannot hold water because the documentary evidence cannot be overridden by an oral account. Considering the fact that there is no evidence to prove that the late Purshottam Ishwarlal bought the suit premises. Therefore, I am not in accord with Mr. Malimi that Purshottam Ishwarlal owned the suit land under the names of the Pravin Purshottam and Rajesh Purshottam. DW1 and DW2 did not even object to the registration of sub-divided titles which was done in 2017 as a result the registration proceeded and was effected into names of the beneficiaries of the late Pravin Purshottam and Radish Purshottam. In the case of **Amina Maulid & 2 Others v Ramadhan Juma**, Civil Appeal No. 35 of 2019 (CAT) at Mwanza the Court held that:-

“....a person with a certificate thereof will always be taken the lawful owner unless it is proved that the certificate was not lawfully obtained”

Similarly, in the case of **Jane Kimaro v Vicky Adili (Administrator of the Estate of the late Adili Daniel Mande)** Civil Appeal No. 2012 of 2016 among other things, the Court observed that:

“Ownership of land starts in whose name that estate or interest is registered.”

Therefore, as long as the Plaintiffs testified to the effect that they are lawful owners of the suit property and they tendered a Certificate of Title (Exh.P6) to substantiate their claims then the Plaintiffs proved their case. Therefore, I hold that the Plaintiffs have proved their ownership of the suit premises. Thus, the first issue is answered in the affirmative.

The second issue; *if the answer to issue No. 1 is answered in the negative, is whether the suit property belongs to the estate of the late Purshottam Ishwarlal.* Since the first issue was answered in the affirmative then this ground is redundant.

Next for consideration is the third issue on Counter Claim *whether the Counter Claim is time-barred.* First of all the Plaintiffs in the Counter Claim have raised issues related to probate and this Court is not in a position to determine probate matters. Therefore, I will determine the issue of time barred in a nutshell since the same was not required to be determined by this Court. The records shows that the cause of action arose in 1997 when Purshottam Ishwarlal was alive and he did not raise any claim against the

transfer of ownership. After his death, the Defendant filed their Counter Claim in 2022. Counting the days from the year when the cause of action arose in 1997 to the date when the Defendants lodged a Counter Claim before this Court in 2022, is a lapse of 25 years. Even counting the days from the date when the later Purshottam passed away in 2005 and the Defendants lodged the Counter Claim in this Court in 2022 is a lapse of 17 years. It is beyond the prescribed time limit provided under Item 22 of the 1st Schedule of the Law of Limitation Act, Cap.89. Thus, in my view the Counter Claim is time-barred.

On the fourth issue; *what reliefs are parties entitled to*. Regarding the prayer of general damages. It is the trite law that general damages must be averred that such damage has been suffered by the plaintiff after the consideration and deliberation on the evidence on record able to justify the award. The general damage is never quantified, as they are paid at the discretion of the court as it is the court that decides which amount to award, and in doing so, the court has to assign reasons in awarding the same. See **Alfred Fundi vs Geled Mango & 2 Others** Civil Appeal No. 49 Of 2017 CAT Mwanza, **YARA Tanzania Limited versus Charles Aloyce Msemwa and 2 Others**; Commercial Case No. 5 of 2013: HC of Tanzania (Commercial Division) at Dar es Salaam (unreported). Therefore, this prayer is unfounded.

In light of the evidence adduced before this Court, it is clear the Plaintiffs are entitled to some of the reliefs claimed because they have established and proved their ownership of the suit premises. On the other side, I find and hold that the Defendants in the Counter Claim have failed to prove their case to the required standard; that is, proof of the case on the balance of probabilities. On the premises, the suit fails. I as well enter judgment for the Plaintiffs in the main case and proceed to make the following orders:

1. The Plaintiffs in the main suit are the lawful owner of the suit premises.
2. The Defendants to the main suit and their agents are restrained from interfering with the peaceful enjoyment of the suit premises.
3. In the circumstances of this case are concerned, since the parties are relatives, each party has to bear its own costs.

Order accordingly



A.Z. MGEYEKWA

JUDGE

19.09.2022

Judgment delivered on 19th August, 2022 in the presence of Mr. Erick Simon, learned counsel for the Plaintiff, and Ms. Queen Allen, learned counsel for the Defendants.



A.Z. MGEYEKWA
JUDGE
19.09.2022

Right to appeal fully explained.