

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 186 OF 2020**

**BETWEEN**

**MLANDIZI FARMS LIMITED ..... PLAINTIFF**

**VERSUS**

**NIKOLAOUS DIAMANDIS DRIZOS .....DEFENDANT**

**EXPARTE JUDGMENT**

*Date of last Order: 10/08/2022*

*Date of Judgment: 29/09/2022*

**A. MSAFIRI, J.**

The plaintiff, Mlandizi Farms Limited, had previously instituted this suit against the three defendants namely Emmanuel Marangakis (1<sup>st</sup> defendant), Otto Mark Mosha (2<sup>nd</sup> defendant) and Nikolaous Diamandis Drizos (3<sup>rd</sup> defendant).

The plaintiff was claiming ownership over the farm registered as Farm No. 735 registered under the Certificate of Title No. 39239 located at Disunyara, Kibaha District.

The plaintiff also seek for the Court's declaration that the Settlement Decree in Land Case No. 09 of 2018 was procured by fraud, the Court's order nullifying the same, and an order nullifying all the sale transactions done by the defendants.

The plaintiff sought for the following reliefs against the defendants;

- (a) Order that the plaintiff is the lawful owner of the suit premises.
- (b) Order that all plots allocation done by the 2<sup>nd</sup> defendant to 1<sup>st</sup> and 3<sup>rd</sup> defendants are null and void.
- (c) That, the Settlement Decree be nullified for being procured by fraud.
- (d) Order that all sales of plots done by defendants be nullified.
- (e) Costs of the suit.
- (f) Any other relief this Honourable Court deem just to grant.

On 25/11/2021, this Court was informed by the counsel for the 1<sup>st</sup> defendant, Mr. Kusalika, learned advocate, that, the 1<sup>st</sup> defendant has passed away and one Emmanuel Pericles Constantinodles has been appointed to administer the estate of the late 1<sup>st</sup> defendant. He said that the said administrator was appointed vide Mirathi No. 614 of 2021 before Temeke Primary Court. The prayer was made before the Court to amend the name of the 1<sup>st</sup> defendant

in the pleadings to reflect the name of the administrator of the estate of the 1<sup>st</sup> defendant. The prayers were granted.

Before the commencement of the hearing of the case, on 29/4/2022, the plaintiff, represented by Mr. Samwel Shadrack , learned advocate, and the 1<sup>st</sup> and 2<sup>nd</sup> defendants represented by Mr. Augustino Kusalika, learned advocate, informed the Court that they have filed a Deed of Settlement which involves plaintiff, 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant only. They prayed for the matter between parties to be settled as per the terms of Deed of Settlement and Consent Judgment be entered thereof.

The Court recorded the Deed of Settlement as a Decree and entered a Consent Judgment between the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants. However, this settlement did not include the 3<sup>rd</sup> defendant, so the case between the plaintiff and the 3<sup>rd</sup> defendant proceeded. It should be noted that, the 3<sup>rd</sup> defendant Nikolaous Diamandis Drizos has never entered appearance before the Court since this case was instituted. There were efforts by the plaintiff to trace the whereabouts of the 3<sup>rd</sup> defendant but they all proved futile. Hence on 24/02/2021, the Court ordered the 3<sup>rd</sup> defendant be served by substituted service via publication in a widely circulated newspaper. This was complied and on 05/7/2022 the Court ordered ex-parte hearing.

Since the 1<sup>st</sup> and 2<sup>nd</sup> defendants have settled the matter amicably with the plaintiff and this Court's Judgment and Decree has been entered, for the purpose of this Judgment, I will address the 3<sup>rd</sup> defendant as the defendant, for the reason that the current dispute is between the plaintiff and the 3<sup>rd</sup> defendant only.

Before the ex-parte hearing, two issues were proposed by the plaintiff and framed by the Court;

1. Who is the lawful owner of 107 plots between the plaintiff and the defendant?
2. To what reliefs are parties entitled to.

During the hearing, Mr. Samwel Shadrack appeared for the plaintiff. The plaintiff presented one witness only to support her claims. Ms. Philipina Kokutona Mosha, testified as PW1 and was the only witness of the plaintiff. She stated that, she knows Mlandizi Farms Limited and she is one of her shareholders. That the company is owned by five Directors who are also shareholders and they are; Otto Mark Mosha, Philipina Kokutona Mosha (who is PW1.), Salome Masowe, Joseph Otto Mosha, and Scolastica Aikarua Mosha.

She tendered the Memorandum and Articles of Association of Mlandizi Farms Ltd which was admitted as Exhibit P1. She said that the Company bought a farm at Mlandizi, at the area known as Disunyara, at Kibaha, Pwani.

The farm was bought from one Emmanuel Marangakis who had a Power of Attorney to sell the farm from one Achilleas Efstathious, the original owner. A photocopy of the special Power of Attorney was admitted as Exhibit P2.

PW1 stated further that, Mlandizi Farm entered a Sale Agreement with Emmanuel Marangakis and bought the disputed farm on 13/12/2010. She tendered the photocopies of Sale Agreement and Transfer of a Right of Occupancy which was admitted collectively as Exhibit P3. She also tendered a photocopy of Certificate of Title as Exhibit P4.

It should be noted that Exhibit P2, P3, and P4 were admitted as secondary evidence under section 67 (1) (c) of the Evidence Act, Cap 6 R. E 2019. This was so after the plaintiff through her advocate Mr. Shadrack filed in Court a Notice to rely on secondary evidence. Mr. Shadrack told the Court that they were unable to retrieve the original documents from the Ministry of Land and Humans Settlements.

PW1 said that, the ownership of the disputed farm was transferred to the plaintiff. After that, the plaintiff and a Company known as Ardhi Plan Limited, entered an agreement for the Ardhi Plan Ltd to resurvey and produce plots on the disputed farm. The work was done whereby the disputed farm was resurveyed and planned into 812 plots.

PW1, said that after completing the resurveying and planning, the plaintiff paid Ardhi Plan Ltd by giving the Company 139 plots as per their agreement. She testified further that, after survey and plan of the disputed farm have completed, one of the plaintiff's directors, Otto Mark Mosha went against the plaintiff and joined the defendant and Emmanuel Marangakis and without knowledge and authority of the plaintiff, the three of them divided the plots in the disputed property between themselves as follows; Otto Mark Mosha got 497 plots, Emmanuel Marangakis got 38 plots and the defendant got 107 plots.

PW1 stated that, the plaintiff came to know of the distribution of the disputed plots when she was informed by Kibaha District Council, when the latter wrote to the plaintiff requesting for her approval of the distribution of the disputed plots.

Also, PW1 stated that, the plaintiff also received a copy of Deed of Settlement in Land Case No. 09/2018 which was entered by Emmanuel Marangakis and Otto Mark Mosha without the knowledge of the plaintiff. She tendered Exhibit P5, a request letter from Kibaha District Council and Exhibit P6, a copy of Deed of Settlement in Land Case No. 09/2018 which were admitted in Court as secondary evidence under section 67(1) (c) of the Evidence Act, Cap.6.

PW1 said that the plaintiff decided to institute this suit after discovery of the distribution of her lawful owned plots between the defendant, Emmanuel Marangakis and Otto Mark Mosha without her knowledge and approval. She stated that, having settled amicably the dispute with Marangakis and Otto Mosha, the plaintiff claims are against the current defendant. She prayed that, the Court intervene and order that the plaintiff gets back her 107 plots which are illegally owned by the defendant.

Having gone through the evidence presented, I will determine the framed issues, the first being, who is the lawful owner of 107 plots between the plaintiff and the defendant.

It is trite law that whoever desires a Court to give judgment in his/her favour, he/she must prove that the facts they alleges or claims, do exist. This is laid by the Law of Evidence Act, under sections 110 and 112 of the said Act.

Also, there are numerous cases of the Court of Appeal which cements this principle of law. In the case of **Ernest Sebastian Mbele vs. Sebastian Sebastian Mbele & 2 others**, Civil Appeal No. 66 of 2019, Court of Appeal at Iringa (unreported) it was held that;

*"The law places a burden of proof upon a person who desires Court to give judgment and such a person who asserts the existence of facts to prove that those facts exists. (Section 110 (1) and (2) of the Evidence Act). Such facts is said to be proved when, in civil matters its existence is established by a preponderance of probability."*

Guided by the above principle, in the matter at hand, the plaintiff bears the evidential burden to prove her case on a balance of probabilities despite that the hearing was one sided (ex-parte against the defendant). The plaintiff through oral evidence of PW1, and documentary evidence through Exhibits tendered particularly exhibits P3 and P4, has established to the



satisfaction of the Court that the plaintiff is the lawful owner of Farm No. 735 situated at Disunyara in Kibaha District. The farm was registered and issued Title No. 39239 which was then transferred to the plaintiff on 16/12/2010 as per Exhibits P3 and P4.

The plaintiff have also established that, she had no knowledge of Out of Court Settlement Deed in Land Case No. 09 of 2018 and did not authorize the distribution of the disputed plot on the disputed farm between the defendant and Emmanuel Marangakis and Otto Mark Mosha. This is from the evidence of PW1, who is also one of the shareholders of the plaintiff, who stated that there was no a Board Resolution by the plaintiff to authorize one Otto Mark Mosha, also one of the Directors of the plaintiff to distribute the disputed plots between himself, Emmanuel Marangakis and the defendant. This is also proved by the contents of Exhibit P5 which shows that the authorization of the distribution by circular resolution should have been done by Mlandizi Farm Limited (Plaintiff) after unanimous agreement and not by Otto Mosha, who is one of the shareholders of the Company.

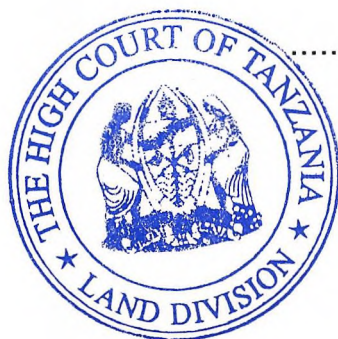
By this evidence, the first issue is answered that the plaintiff is the lawful owner of 107 plots which came out of Farm No. 735, Disunyara area,

Kibaha, after the said farm was resurveyed and planned and changed from farm to plots.

The second issue is to what reliefs parties are entitled to. Having find that the plaintiff is the lawful owner of the 107 plots which she claimed to be illegally allocated and illegally in possession of the defendant, then I find that the plaintiff is entitled to reallocation of the disputed plots.

I hereby declare that the allocation and possession of 107 plots to the defendant is null and void and the said plots should be restored back to the plaintiff as the lawful owner. The costs of the suit to be borne by the defendant.

It is so ordered.



A. MSAFIRI  
**JUDGE**  
**29/9/2022.**