

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 316 OF 2010

**RASHID KITWANGA (As Administrator of the estates
of ABDALLAH MSHAM KITWANGA) APPELLANT**

VERSUS

**JANE DAVID MUSHI (Administrator of
the estate of the late DAVID MUSHI) RESPONDENT**

JUDGMENT

Date of the last Order: 21.10.2022

Date of Judgment: 28.10..2022

A.Z. MGEYEKWA, J

At the centre of controversy between RASHID KITWANGA (Administrator of the estates of ABDALLAH MSHAM KITWANGA), the Plaintiff, and JANE DAVID MUSHI (Administrator of the estate of the late DAVID MUSHI). The bone of contention is on the ownership of the suit land

situated at Madale in Kinondoni Municipality within Dar es Salaam Region. The gist of the parties' dispute in the instant matter is gathered from the pleadings the same goes as; The Plaintiff alleged that he acquired the suit farm during operation Vijiji (Pwani) and has been using it with his family. The Plaintiff alleges that the suit farm is one of his farms which he gave to her daughter who used it with her husband but unfortunately her daughter and her husband passed away without leaving behind any child. According to the Plaint, the Plaintiff repossessed the farm but when waiting for rainy season he suddenly saw the Defendant digging, farming, and building in the suit farm.

According to the Plaint, the Plaintiff approached the Defendant and asked him why he entered the farm without his permission, the Defendant replied that the farm was sold to him by the unknown purported owner. The Plaintiff claimed that the Defendant bought the farm through the conmen without inviting neighbours to assure himself whether the said seller was a true owner of the farm. The Plaintiff claims that the Defendant maliciously trespassed on the farm. He alleged that the Defendant unlawfully trespassed into his farm.

In the Plaint, the Plaintiff prays for Judgment and Decree against the defendants are crystalized as follows: -

1. A declaration that the Plaintiff is the lawful owner of the suit Farm.

2. A declaration that the Defendant is a trespasser hence he must pay general damages to the tune of Tshs. 2,000,000/=.
3. This Honourable Court be pleased to issue an eviction order to the Defendant.
4. The Defendant be permanently restrained from entering again or and do anything within the suit Farm.
5. Costs to this case.
6. Any other reliefs as the Honourable Court may deem fit and just to grant.

In response to the Plaint, on 16th November, 2012, the Defendant filed a Written Statement of Defence disputing all the claims and urged this court to dismiss the entire suit with costs.

It is imperative at the outset to point out that, this matter was determined by my learned sister Hon. Wambura, J, and the matter was decided in the favour of the Plaintiff. Dissatisfied, the Defendant lodged an appeal before the Court of Appeal of Tanzania. The Court of Appeal of Tanzania remitted the file to this Court to proceed from the stage reached prior to 5th May, 2015. Guided by the Court of Appeal of Tanzania, the Court proceed with the defence case. I thus heard part of the defence case, now I have to evaluate and determine the evidence adduced by the witnesses and decide on the matter in controversy.

During the hearing of the defence case, the Plaintiff was represented by Mr. Kumwenda, counsel assisted by Mr. Ngassa Ganja, counsel while the Defendant was represented by Mr. Wilson Ogunda, learned counsel. During the Final Pre-trial Conference, the following two issues were framed by this Court: -

1) Who is the lawful owner of the suit land.

2) To what reliefs are the parties entitled to.

In what seemed to be a contested trial, the Plaintiff called two witnesses and the Defendants summoned four witnesses. The Plaintiff's case was founded on Abdallah Msham Kitwanga (now deceased), who testified as PW1, and Ally Abdallah (PW2). The Defendant called four witnesses; David Tengerio Mushi (now deceased) who testified as DW1, Jane Mtowo testified as DW2. Emmanuel Fumbuka Segeja (DW3) and Sande John Msangazila was the third witness (DW4). The Defendants tendered four (3) Exhibits namely; a Sale Agreement dated 7th July, 1994 (Exh.D1), Receipts for Water Project with No. 00035 dated 13th July, 1994 (ExhP2), and Forms of verification for ownership for Plots Nos. 293, 294, 295, 296, 297, and 298 and a receipt of payment (Exh.D3 collectively).

By the order of this court, parties were ordered to file final submissions on 20th October, 2022 whereby both parties complied with the court order

effectually, and the final submissions from both parties were extremely considered in articulating this Judgment.

The analyses of this issue show that the parties herein lock horns on who is the lawful owner of the suit property. In a chronological account of the ownership of the property the Plaintiff presented; he occupied the suit land during the period of Operation of Vijiji. PW2, Kitwanga testified that he is the street Council and was a leader since 1985. He testified that PW1 was his neighbor and he was living with her daughter. PW2 refused to identify the Sale Agreement and stated that he did not prepare it. However, the sale agreement (Exh.D1) was signed by the Chairman and the Secretary of Madala Street and the same was stamped. PW2's evidence was not supported by any documentary evidence and the alleged neighbours; Buyenge and Ally Ngesheni were not called to testify in court. Since PW2 evidence was not collaborated by any evidence then it cannot be said that the Plaintiff proves his case.

On the other hand, DW2 testified to the effect that in 1994, Jane Matowo and Aika Siya Mongi bought a farm measuring 10 hectares located in Madale Village. To support her testimony, she tendered a Sale Agreement. I have scrutinized the Sale Agreement and noted that the Chairman and Secretary of Madala Street appended their signatures and the same bears a Street Chairman Office stamp. A witness witnessed the

Sale Agreement dated 7th July, 1994 in front of Hamisi Ismail the tencell leader of Madala. The buyers' names are Jane Matowo and Aika Siya Mongi and the vendor's name is Musha Ngombo. In my considered view, it was a genuine Sale Agreement. I have considered the fact that the leaders signed the document and the same bears the Street Chairman of Madala stamp.

DW3, Mr. Wilson is a Legal Officer employed by Kinondoni Municipality. He testified to the effect that the Defendant applied for a land survey in 2009. DW3 testified that they approved the two forms namely the verification form, payment form, and a letter to process a Certificate of Occupancy were filled in by the Defendant. He testified to the effect that the documents used in issuing the Certificate of Title are genuine documents.

I have seen the documents titled '*Kumbukumbu za Uhakiki wa Miliki*' of Madala Street, Kunduchi Ward at Kinondoni District. The documents were filled in by Jane David, Aika Siya Mongi, Jane David Mushi as the Guardian of Karisa David Mushi, and the said documents are official forms that were used to process the Certificate of Titles. DW3 went on to testify that there were 6 plots; No. 293 -298, No. 2. 293 – the owner is Haika Mongi, 294- Moka Mongi, No. 295 – Mariam Mongi No. 296 – Jane Mushi and Karim Mushi (two owners) No. 297 owner is Jane Mushi and 298 is

David Mushi. DW3 stated that the status of the suit plot is that there is a revocation after the subdivision of the plots and the procedure of issuing Certificate of Titles is ongoing.

DW4, Executive Officer of Madale Street from the year 2007 to 2010. DW4 identified the documents concerning ownership of plots located at Madale, whereas he testified that the documents (Exh.D3 collectively) show that Jane and Aika bought a suit land, he signed the Sale Agreement and affixed the stamp of Executive Officer of Madale.

The proof of ownership of land in our jurisprudence was discussed in various cases such as **Amina Maulid & 2 Others v Ramadhan Juma**, Civil Appeal No. 35 of 2019 (CAT) at Mwanza where among other things 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.”

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 it was observed that:-

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

Applying the above authorities in the instant case, I found that the Plaintiff has failed to prove that he is the lawful owner of the suit land. PW1 testified that he acquired the suit land customarily in 1954. However, he did not tender any documentary evidence to prove his case. It is my considered view that a mere statement that he occupied the suit land during Operation Vijiji, cannot establish or prove his ownership of land.

Mr. Kumwenda in his final submission raised an issue of stamp duty, the proceedings show that the counsel did not raise his concern before the admission of the Sale Agreement, thus, the Sale Agreement was admitted and formed part of the Defendant's evidence. The evidence of DW2 was corroborated by DW4 evidence who witnessed the Sale Agreement and again DW3 proved that the Defendant followed the procedure of acquiring the Certificate of Title. DW3 verified the forms and they conducted a survey in 2005. Therefore, in my considered opinion, the Defendant unequivocally proved that the suit piece of land Plot No. 298 measuring 8169 sqm located at Madale former Madala is in the process of subdivision. The size of the plot and boundaries were not stated in the Sale Agreement, however, the DW2, and DW3 evidence corroborated the fact that the Defendant bought the suit land.

It was also evidenced through documents issued by the Kinondoni Municipality the documents titled '*uhakiki wa miliki*' the forms were filled

in by the applicants. Also, it is evident that the Defendant has been paying land rent pertaining to the suit landed property as per exhibit P3, there is an acknowledgment of payments document regarding Plot No. 298 measuring 8169 located at Madale. They paid fees for Certification of Occupancy, Registration, Survey, Deed Plan, and land rent for the years 2009- 2010.

As pointed out earlier, the burden of proof is upon the Plaintiff to convince this Court that he has proved his case. The burden of proof is established in the case of **Dr. A Nkini & Associates Limited vs. National Housing Corporation**, Civil Appeal No. 72 of 2015 CAT at DSM (unreported) on page 14 & 15 para 2, it was held that:

*'The settled law is that **he who wants the court to consider that certain fact exists, has the duty to adduce evidence to that effect.** ... This section is based on the rule i.e. incumbit probation qui dicit non qui negat; the burden of proving a fact rests on the party who substantially asserts the issue and not upon the party who denies it, for a negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons"*

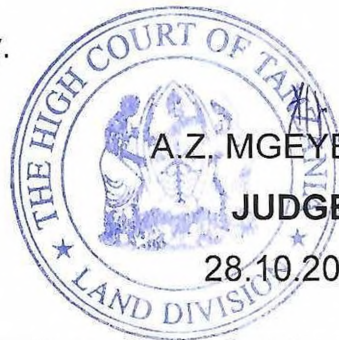
Equally, in the case of **Abdul Karim Haji v Raymond Nchimbi Alois & another** [2006] TLR 419 Court of Appeal of Tanzania sitting at Zanzibar stated that:

"It is an elementary principle that he who alleges is the one responsible to prove his allegation."

Applying the above authorities in the instant case, it is vivid that the Plaintiff has failed to discharge his duty against the Defendant, it is apparent that the suit land does not belong to the Plaintiff.

In the upshot, the suit is dismissed entirety with costs.

Order accordingly.


A.Z. MGEYEKWA
JUDGE
28.10.2022

Judgment delivered on 28th October, 2022 via video conferencing whereas Mr. Sylvester Korosso was holding brief for Mr. Wilson Ongunde, counsel for the Defendants and Mr. Ngassa Ganja, learned counsel for the Defendant were remotely present.


A.Z. MGEYEKWA
JUDGE
28.10.2022

Right to appeal fully explained.