

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 104 OF 2011**

**BY COUNTERCLAIM**

**PETER JOSEPH SWAI..... PLAINTIFF**

**VERSUS**

**HILDER EMMANUEL MAKELEMO (As Administratrix of the Estate of the late Emmanuel Lazaro Makelema) .....DEFENDANT**

**JUDGMENT**

**(ON A COUNTERCLAIM)**

*28/10/2022 & 22/11/2022*

**A. MSAFIRI, J.**

This suit was instituted for the first time in this Court on 20/6/2011 by Emmanuel Lazaro Makelema, against Peter Joseph Swai. He was praying for the following orders, A declaratory order that he is lawful registered owner of Plot No. 8 Block B Ununio Kinondoni Dar es Salaam City and that the defendant is a trespasser; The defendant be ordered to compensate the plaintiff TZS. 50,000,000/= being the value of the demolished house; The defendant be ordered to demolish the block fence built around the plot and the servant house at his own costs; The defendant be ordered to pay general, punitive and exemplary damages; Any other relief and costs.

The defendant Peter Joseph Swai filed his written statement of defence and denied every claim levelled against him by the plaintiff. He further raised

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and filed a counterclaim and added one Gabriel Mpakatamwiu Mikwamba as a 2<sup>nd</sup> defendant in a counterclaim. However, the main case was dismissed on 09/6/2015 for want of prosecution and the Court ordered for the counterclaim to be heard ex-parte.

Before the take off of the hearing of a counter claim ex-parte, the original plaintiff Emmanuel Lazaro Makelemo instituted an application to set aside the dismissal order. The application was dismissed on 01/3/2016.

The counterclaim proceeded ex-parte and the ex-parte judgment was delivered on 18/06/2018 in favour of Peter Joseph Swai.

The original plaintiff, Emmanuel Makelemo passed away on 22/3/2016 and his daughter Hilder Emmanuel Makelemo was appointed as an administratrix of his estate. The administratrix lodged an Application No. 435 of 2018 in this Court in which she prayed to set aside the ex-parte judgment and decree on a counterclaim dated 18/6/2018 by this Court. The application was granted whereas the ex-parte judgment and its subsequent decree were set aside. The Court ordered the hearing of the counterclaim inter partes, hence the present suit.

In the present suit i.e. the counterclaim, one Peter Joseph Swai is the plaintiff and Hilder Emmanuel Makelemo (As administratrix of the Estate of the late Emmanuel Lazaro Makelemo) is the 1<sup>st</sup> defendant, while one Gabriel Mpakatamwiu Mikwamba was the 2<sup>nd</sup> defendant.

In the suit at hand, the plaintiff was represented by Mr. Kefas Mayenje, the 1<sup>st</sup> defendant was represented by Mr. Deusdedit Luteja, and Mr. Living Rafael was appearing for the 2<sup>nd</sup> defendant. On 17/5/2022, Mr. Rafael orally *Adls.*

informed the Court that the 2<sup>nd</sup> defendant has passed away and that they are on the process of appointing the administrator of his estate. He said the 2<sup>nd</sup> defendant died on 25/4/2022. He supplied to the Court a copy of Burial Permit.

The Court adjourned the matter to pave way for the appointment of the administrator. After 90 days has passed without the administrator having been appointed, this Court declared that the case has abated against the 2<sup>nd</sup> defendant as per Order XXII, Rule 4(3) of the Civil Procedure Code, Cap 33 R.E 2019. (the CPC). So in this suit one Hilder Emmanuel Makelemo (as administratrix of the Estate of the late Emmanuel Lazaro Makelemo) who was the 1<sup>st</sup> defendant, will now be referred as the defendant.

In a counterclaim, the plaintiff prays for the judgment and decree against the defendant as follows;

- i) For declaration order that the plaintiff is a legal owner of the suit property situated at Plot No. 8 Block B Ununio Area, Kinondoni Municipality within the City of Dar es Salaam.
- ii) For declaration that the Certificate of Title issued to the defendant in respect of plaintiff's Plot No. 8 Block B Ununio was issued contrary to the law thus null and void.
- iii) For declaration that the defendant has trespassed on the plaintiff's Plot No. 8 Block B Ununio Area.
- iv) For an order of permanent injunction against the defendant to restrain him, his agents, workmen, allocating authorities, or any other person from entering and interfering with the plaintiff's

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ownership and development of the suit property known as Plot No. 8 Block B Ununio Area, in Kinondoni Municipality within the City of Dar es Salaam.

- v) That the 1<sup>st</sup> defendant be ordered to pay general damages to be assessed by the Court at the tune of TZS. 50,000,000/=
- vi) That the defendants be ordered to pay costs of this counterclaim.
- vii) Any other relief the Court deems fit and just to grant.

The framed issues were as follows:

- i) Who is the lawful owner of the suit property located at Plot No. 8 Block B Ununio, Kinondoni Municipality?
- ii) If issue 1 is answered in the affirmative who has suffered any damages?
- iii) Any other relief the parties are entitled to.

The core issue here is who is the lawful owner of the suit property? Each of the party to the suit has presented evidence to this Court, oral and documentary to prove that they are the lawful owners of the suit property described as Plot No. 8, Block B Ununio Area.

The plaintiff in a counterclaim Peter Joseph Swai, testified as PW1. He was the only witness for the plaintiff's case. He stated that he knew Gabriel Mpakatamwiu Mikwamba as his neighbour, and they lived closely at Ununio area, Kinondoni.

He stated that Gabriel Mikwamba approached him and told him he was selling a plot. That Mikwamba showed him documents which shows that, Mikwamba bought the Plot from one Hussein Abdul in 1995. The said

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document was admitted in Court as Exhibit P1. It is a sale agreement of a farm from Hussein Abdul to Gabriel Mikwamba. The sale was on 16/8/1985 and it took place at Kijiji cha Ujamaa Ununio.

PW1, told the Court that, after buying the farm, Gabriel Mikwamba had it surveyed, and an offer was issued. The farm was registered as Plot No. 8 Block B Ununio, Dar es Salaam. PW1 tendered a letter of offer which was admitted as Exhibit P2. He stated that the letter of offer was issued by the Ministry of Land, and was issued to Gabriel Mikwamba and it was copied to the Land Office, Kinondoni, Dar es Salaam.

PW1 also tendered photocopies of the receipts of payments of offer acceptance. He stated that the original receipts were sent to the Land Office, Kinondoni, and when he followed up to the said Land Office to retrieve the original ones, he was unsuccessful. The copies of the receipts were tendered as Exhibit P3.

PW1 stated further that he decided to make a search at Kinondoni Land Office and was assured that the documents were genuine. He tendered a sale agreement between him and Gabriel Mikwamba which was admitted as Exhibit P4. Exhibit P4 shows that Gabriel Mikwamba sold the suit property to PW1 (the plaintiff), and the sale was done on 03/12/2010. The purchasing price was TZS 30 Million only.

After purchase, PW1 found that Gabriel Mikwamba had not paid land rent for a long time. So, after assessment, he paid land rent arrears amounting to TZS 1,399.666.40. He tendered the assessment and a payment receipt which were admitted collectively as Exhibit P5. He also tendered a

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copy of building permit and receipts which were admitted as Exhibit P6. He stated that the original copies were taken to the Municipal Council when the dispute arose and they were misplaced. PW1 stated that, using the said building permit which was issued by Dar es Salaam Commission to Gabriel Mikwamba, he built a fence, and a servant quarter. He also installed electricity and water.

PW1 stated further that, when he started to process the transfer of ownership from Gabriel Mikwamba to him, Emmanuel Makelemo (now deceased), emerged and told him that he (Emmanuel) was also processing ownership of the suit property and anytime he can get a title of ownership. He averred that, Emmanuel Makelemo told him that if he was in need of a suit property, he has to pay him about Six (6) Million Shillings so that he can release the suit property.

PW1 stated further that, after two weeks, he was summoned by the Kinondoni Land Office and was informed that Emmanuel Makelemo claims to have interest on the suit property. Later, Emmanuel Makelemo instituted the main suit which was later dismissed hence this counterclaim.

He prayed for the Court to declare him as the lawful owner of the suit property and declaration that any other documents on ownership which has been obtained fraudulently to be declared null and void. He told the Court that since Mr. Makelemo is now deceased, he is now withdrawing his prayers for general damages and costs and prayed that each party should bear their own costs. After that, the plaintiff closed his case.

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To prove that she is the owner of the suit property, the defence called one Hilder Emmanuel Makelemo as DW1. She stated that she is an administratrix of the estate of late Emmanuel Lazaro Makelemo who is her father. She stated that her father died on 22/2/2013, and she was appointed as an administratrix of his estate. She said that, she was appointed so by the High Court, however she did not produce any letter of administration to prove that.

DW1 stated that, after being appointed as an administratrix, she went through her late father's documents. She said that, she had previous knowledge that her deceased father had instituted a suit against the now plaintiff, Peter Swai and it was about the suit property. So, she followed up on the matter, and she filed an application to set aside an ex-parte judgment on counterclaim so the Court ordered the same to be heard inter-partes.

DW1 averred that, as an administratrix, she collected various documents which concerns the suit property. She said that among the documents, she saw a Certificate of Title on Plot No. 8 Block B, Ununio, which she identified by her father's signature which she knew. That, the said Certificate was under her custody since 2013 when her father died. She tendered the Certificate which was admitted as Exhibit D1. It shows that it was issued on 03/3/2011.

DW1 also tendered a letter claimed to be written by the late Makelemo, requesting to join Ununio Village. The letter was dated 10/3/1986 and was admitted in Court as exhibit D2. She also tendered a letter from the Ministry

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of Land, addressed to the Director, Kinondoni Municipality about the suit property. It was admitted as Exhibit D3.

DW1, tendered a collection of letters which were correspondences between the Land Office, Ministry of Land and the Director of Kinondoni Municipal, which were copied to Emmanuel Lazaro Makelemo. The letters were admitted collectively as Exhibit D4. The letters were about the process of allocating the suit property to Emmanuel Makelemo. DW1 also tendered a letter from Emmanuel Makelemo, to the Director of Surveyor, about the survey of the suit property. The letter was admitted as Exhibit D5.

DW1, tendered a letter from the Registrar of Titles addressed to Emmanuel Makelemo, informing him that a Certificate of Title No. 118337 is a genuine document and has been registered by the Office of the Registrar of Titles and that the owner of the property is Emmanuel Makelemo. The letter was admitted in Court as Exhibit D6. She prayed for the Court to dismiss the claims of the plaintiff, Peter Swai, with costs.

The parties through their advocates filed their final submissions and the Court, in the determination of this matter, has considered the analysis of evidence in the submissions and authorities referred to this Court by the learned counsels.

It is trite law that whoever desires a Court to give judgment in his/her favour, he/she must prove that those facts exists. This is as per sections 110(1)(2) and 112 of the Evidence Act, Cap 6 R.E 2019.

It is a rule of law that the standard of proof in civil matters is on a balance of probabilities. This principle is set in numerous authorities among

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them being the case of **Godfrey Sayi vs. Anna Siame (as legal Representative of the late Many Mndolwa)**, Civil Appeal No. 114 of 2012 (CAT) (Unreported) where the Court of Appeal stated thus;

*"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities"*

As stated earlier, this case is centered on the dispute of ownership of Plot No. 8 Block B Ununio Area. The plaintiff has produced a sale agreement, Exhibit P4 which shows that he bought suit property from Gabriel Mpakatamwiu Mikwamba who is claimed to be the previous owner.

He also produced Exhibit P2 which is a letter of offer which was issued to Gabriel Mpakatamwiu Mikwamba on 06/1/1989 on the suit property. The letter was issued by the Ministry of Land, Land Division, Dar es Salaam. The plaintiff have also produced the assessment of land rent on the suit property which was done on 06/12/2010 by the Ministry for Land of land rent arrears amounting to TZS.1,399,666.40, and the amount was paid, proved by the receipt of payments which were admitted as Exhibit P5.

The defendant also has produced Exhibits D1-D6 including a Certificate of Title which shows that, she is the lawful owner of the suit property.

Each party is claiming to be the lawful owner of the suit property and that, his opponent ownership is not valid. I have also observed the claims of fraud and forgeries in the pleadings.

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The plaintiff in his claims as per his Plea in the counterclaim, prays for a declaration that a Certificate of Title issued to the defendant is null and void. The plaintiff also claims that there was fraud in the process of applying, processing and obtaining the said Certificate of Title by the defendant.

There are also claims of forgery in the defendant's written statement of defence. The defendant claims that the letter of offer by the plaintiff is forged and that Gabriel Mpakatamwiu Mikwamba never bought the suit property as claimed.

However, none of the parties produced any evidence to prove their claims of having been fraud and/or forgeries in the acquiescence of documents pertaining the ownership of the suit property. The available evidence is on mere oral testimonies by the parties and the mere claims in the pleadings without any proof. Even in their final submissions, each party through their advocates kept accusing each other of fraud and/ or forgeries but with no scintilla of evidence to prove those accusations. So, in absence of documentary evidence, the Court cannot rely on mere words in the pleadings and oral testimonies in Court to determine the claims of fraud and forgeries.

It is a principle of law that where a claim of fraud is raised in a civil case, the standard of proof is higher than it is in normal civil cases given its criminality. (See the case of **Omari Yusufu vs Rahma Ahmed Abdulkadr** [1987] TLR 169 (CAT)).

Since there is no proof from any party on the claims of fraud and forgeries of documents, the Court finds that the parties have failed to

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establish their claims hence the documents presented by parties' are assumed to be genuine/authentic.

Having found all the ownership documents i.e. by both plaintiff and the 1<sup>st</sup> defendant are authentic, then it is my view that this is a case of double allocation where the two parties have been granted ownership of the same property.

The suit plot was allocated first to Gabriel Mpakatamwiu Mikwamba by a letter of offer dated 06/1/1989 which is Exhibit P2. It shows that, the said Gabriel M. Mikwamba paid requisite fees for land rent and stamp duty on 11/2/1989 and accepted the said offer. Gabriel M. Mwikwamba sold the suit plot to the plaintiff in 03/12/2010 who went on to pay the land rent arrears from 1996 to 2011, which is evidenced by Exhibit P5. He has also a building permit issued on 08/9/2000 on the suit plot.

On her side, the defendant has a Certificate of Occupancy which was issued in 03/3/2011. It shows that the suit property was also allocated to Emmanuel Makelemo in 2011. The defendant has also a letter requesting to join Ununio Village which was written on 10/3/1986. The letter was admitted as Exhibit D2. However, it is my view that it is not clear by this letter that, the request of joining the village was accepted or the deceased Emmanuel Makelemo was given a land for farming and building a house as per his requests in Exhibit D2. Even if this request for land allocation was accepted, it is not clear or ascertained that the land requested was the suit property and not any other land at Ununio Village.

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Hence, by the letter of offer issued to the first owner of the suit property Gabriel M. Mikwamba, it is this Court's finding that he was the first person to be allocated the suit property before Emmanuel Lazaro Makelelemo.

So, if the principle of priority is put into play in solving the dispute between the parties, Gabriel M. Mikwamba being the first person to be allocated the suit property, then he was the rightful owner of the suit property.

Although Emmanuel Makelelemo have a Certificate of Occupancy, it was issued in 2011. Gabriel M. Mikwamba's right of occupancy was created in 1989 when he was issued with an offer and he paid the fees. There is no evidence that the letter of offer granted to Gabriel M. Mikwamba was ever revoked, or it was revoked by the time a Certificate of Occupancy was issued to the 1<sup>st</sup> defendant. The evidence by Exhibit P5 shows that the plaintiff paid land rent arrears up to the year 2010/2011, so, the suit property was still in his ownership and the same has not been revoked.

The Office of the Registrar of Title, hence could not have granted ownership to the defendant while an offer granted to the plaintiff still exists. Hence, the grant of Certificate of Title to Emmanuel Makelelemo pertaining the suit property was void ab initio as the same was already been granted to another person and the ownership has never been revoked.

In the case of **Sarjit Singh vs. Sebastian Christom** [1988] TLR 24 (HC) it was held that;

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*"It is clear that land becomes legally owned or a right of occupancy is established once an offer for it is made and the offeree pays the fees..."*

According to the above holding, a grant of occupancy is made at the time of the issuance of letter of offer by which the applicant is informed that his application has been approved.

In the case at hand, Gabriel M. Mikwamba was granted right of occupancy when he was issued with letter of offer with approval that his application for a right of occupancy has been approved. He paid the requisite fees so he accepted the offer. There was no evidence that this offer was revoked, so there could not be another grant of occupancy on the same plot.

I know the position in the case of **Amina Maulid Ambali & Others vs. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (CAT) that when two persons have competing interest in a landed property, a person with a Certificate will always be taken to be lawful owner unless it is proved that the Certificate was not lawfully obtained.

However, I find the circumstances in the cited case to be distinguishable from the present case. In the current case both parties have been granted a right of occupancy over the same property. The plaintiff by a letter of offer granted in 1986 and accepted, while the defendant was granted in 2011 by a certificate of occupancy. I have already found that since there was already granted a right of occupancy on the suit property in 1986 by an offer to Gabriel Mikwamba, then the issuance of Certificate of occupancy to the 1<sup>st</sup> defendant in 2011 was void ab initio.

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By this analysis, it is clear that the offer granted to Gabriel Mpakatamwiu Mikwamba is valid. And the said Gabriel M. Mikwamba, lawfully sold the suit property to the plaintiff as proved by sale agreement Exhibit P4.

So, the first issue is answered that the plaintiff in a counterclaim is the lawful owner of the suit property.

The second issue is that if issue No.1 is answered in the affirmative then who has suffered any damages?

Since the first issue has been answered that the plaintiff in a counterclaim is the lawful owner of the suit property, then he is the one who has suffered damages.

In his counterclaim, the plaintiff among other reliefs, he has prayed that the 1<sup>st</sup> defendant be ordered to pay general damages to be assessed by the Court at the tune of TZS. 50,000,000/=. However, on 10/10/2022, while he was giving his evidence as PW1 before the Court, the plaintiff prayed to withdraw this relief prayer. He stated that his claims for damages were against the deceased Emmanuel Makelemo, so since he is no more, he does not wish to pursue the payment for damages on the deceased widow.

Since the plaintiff has withdrawn this prayer, the Court also will not make determination on the same as it is withdrawn from the pleadings. Further, the plaintiff have also prayed to withdraw his prayers for costs, and instead prayed for each party to bear their own costs. The reason advanced is the same sentimental on not wanting to gain any payments from the deceased widow.





The third issue is to what reliefs are parties entitled to.

The plaintiff is entitled to the reliefs he has pleaded, and I proceed to grant them and order as follows;

1. The plaintiff is declared the legal owner of the suit property situated at Plot No.8 Block 'B' Ununio Area, Kinondoni Municipality within the City of Dar es Salaam.
2. The Certificate of Title issued to the defendant in respect of plaintiff's Plot No. 8 Block B Ununio Area, Kinondoni Municipality was issued contrary to the law thus null and void.
3. The defendant is declared a trespasser on the plaintiff's Plot No. 8 Block B Ununio Area, Kinondoni Municipality, Dar es Salaam.
4. A permanent injunction is hereby issued against the defendant, his agents, workmen, allocating authorities, or any other person from entering and interfering with the plaintiff's ownership and development of the suit property known as Plot No.8 Block 'B' Ununio Area in Kinondoni Municipality, Dar es Salaam City.
5. Each party to bear their own costs of this suit.

It is so ordered. Right of appeal is explained.



  
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**A. MSAFIRI**  
**JUDGE**  
**22/11/2022**