

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND CASE NO. 30 OF 2020**

**ASHURA OMARI NYUMBA.....PLAINTIFF**

**VERSUS**

**FARAJI ALLY SAID..... 1<sup>ST</sup> DEFENDANT  
THE COMMISSIONER FOR LANDS..... 2<sup>ND</sup> DEFENDANT  
THE ATTORNEY GENERAL..... 3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

*Date of Last Order: 16/05/2022*

*Date of Judgment: 27/07/2022*

The plaintiff prays for Judgment and Decree against the Defendant as follows:

- i. Declaration that the right of occupancy No. 82878 over Plot No. 2003 Block "E" issued to FARAJ ALLY SAEED BIN ALZOWA is invalid, therefore null and void, for encroaching part of the plaintiff's land;**
- ii. An order compelling the 2<sup>nd</sup> Defendant to revoke the Right of Occupancy no. 82878 issued to the 1<sup>st</sup> Respondent. An order by the Court that the ownership of the encroached land be reverted to the Plaintiff.**
- iii. An Order compelling the 1<sup>st</sup> Defendant to vacate the suit premise and demolish the wall he has built.**

- iv. An order to compelling the 1<sup>st</sup> defendant to pay general damages of TZS 80,000/= for occupation of the land for the whole time he has done so.**
- v. Any other relief(s) this Honourable Court shall deem just and fit to grant.**

The plaintiff being a divorce, and having gone through Matrimonial Cause No. 171/2008 was granted one of the Matrimonial properties situated at Ukonga.

Several years down the lane, the estranged husband sold half of the plaintiff's property which she received in Matrimonial cause to the 1<sup>st</sup> defendant, Faraji Ally Said, claiming that the property belonged to him. It is on this background that the plaintiff came to this Court so that the Court can establish who is the lawful owner of the disputed property and whether the sale was valid.

The plaintiff was represented by Advocate Yusuph Mathias and the 1<sup>st</sup> defendant was presented by Hassan Chande while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were presented by Hossana Mgeni and Narindwa Sekimanga, Principle State Attorneys.

During the hearing it was the contention of PW1, Sheila A. Kingwiti who is the daughter of the plaintiff, that their property has been encroached and taken by the 1<sup>st</sup> defendant, Faraji Ally Said. She told the Court that the 1<sup>st</sup> defendant is their neighbour on the Eastern and Northern side of their mother's property. That, the property taken by the 1<sup>st</sup> defendant is 20 x 10 paces. PW1 tendered Residential License with No. ILA/UKG/MDF7/90 which was admitted as Exhibit. P1. In the said license, it is shown that Ashura

Nyumba is the owner of the said property situated at Gongolamboto Mdhambarauni.

She further told the Court that her mother Bi. Ashura together with her estranged husband owned two different properties, one at Gongolamboto and another at Kivule. That, through a Matrimonial proceeding, the said properties were divided by the Court where the plaintiff, Ashura Nyumba was given Gongolamboto property while her estranged husband, Abdallah Kingwiti was given the Kivule property (Exhibit P2).

That, later on, Abdallah Kingwiti sold a part of the Gongolamboto property, belonging to Bi. Ashura, to the 1<sup>st</sup> Defendant Faraji Ally Said.

During cross examination PW1 admitted that there are two plots at Gongolamboto property which are all under one residential licence and that they all belong to Ashura Nyumba.

PW2, Halima Abdallah Kingwiti, daughter of Ashura Nyumba also told his Court that the property belonged to her mother through Matrimonial division. However, her father, Abdallah Kingwiti sold part of it to the 1<sup>st</sup> defendant, Faraji Ally Said. That, they had a meeting with the 1<sup>st</sup> defendant so as to reach agreement and the defendant offered to compensate them 40 Million Tanzania Shillings as compensation and also for buy off the remaining land.

On his defence, the 1<sup>st</sup> defendant informed this Court that he bought the land in dispute from Abdallah Kingwiti on 01/05/2008 and paid 10 Million Tanzania Shillings as compensation. The sale agreement was tendered to Court as Exhibit D1.

The defendant further informed this Court that upon acquiring the said piece of land, he made application for survey of the land and that since then he has acquired Letter of Offer of Right of Occupancy and a Title of Deed (Exhibit D2) of the disputed property together with his other landed properties, all under same title.

The defendant further informed this Court that he is aware of Matrimonial Case between the plaintiff and her estranged husband and that what he knows is that part of the land at Gongolamboto was divided to the plaintiff and another part to her husband.

He claimed that there were two houses, one built of bricks and another was a mud house that is no longer standing.

The defendant informed this Court that he knew the Plaintiff, Ashura Nyumba and Abdallah Kingwiti as they are his neighbors. That he has known them since 2002 when he started living there.

DW2, Hassan Abdallah, informed this Court that he works for the 1<sup>st</sup> defendant and that he was a witness of the 1<sup>st</sup> defendant's Sale Agreement between the 1<sup>st</sup> defendant and Abdallah Kingwiti. He claimed to know nothing else other than the sale. He further claimed not to know Abdallah Kingwiti even though he appears in the Sale Agreement as his witness. He claimed that he was asked by his boss, Faraji Ally Said to be Mr. Kingwiti's witness as Abdallah Kingwiti did not have a second witness.

CW1, Aziza Mohamed, the 2<sup>nd</sup> wife of Abdallah Kingwiti gave her testimony as a Court witness.

She informed this Court that she is the 2<sup>nd</sup> wife of Abdallah Saidi Kingwiti. That the late Kingwiti was living in Gongolamboyo with Ashura Omari Nyumba but when he married her, he moved to Kivule to live with her. That Abdallah Kingwiti had 2 residences and that even herself had visited the Gongolamboto residence where Ashura Nyumba lived.

That in Gongolamboto, Ashura and late Abdallah Kingwiti started living in a mud house and after the same crumbled and fell, they built a brick and motter house.

It was the contention of CW1 that the Gongolamboto property was divide between Bi. Ashura and late Kingwiti and that later on late Kingwiti sold his part of the property to 1<sup>st</sup> defendant.

She told the Court that in the Sale Agreement she was a witness for her late husband Abdallah Kingwiti and that the house was sold for 10 Million Tanzania shillings.

During cross examination, CW1 provided that the mud house and brick and moter house were all in one property.

I have considered submissions advanced by both parties together with evidence tendered in Court. Now I have to determine the issue raised in this case as to who is the rightful owner of the said property

In order to determine rightful owner, we have to establish who was allocated the Gongolamboto property in the Matrimonial Cause No 171/2008. Judgment.

It seems that there is assertion from the defendant that Gongolamboto property was divided between the two, that is Ashura Nyumba and Abdallah

Kingwiti. Hence both are owners. This assertion is rooted from a reasoning that Gongolamboto has two plots, hence each was given one plot. However, this was disputed by the plaintiff who claimed that Bi Ashura Nyumba was given the property in Gongolamboto through the Matrimonial Judgement.

I have gone through the Matrimonial Judgment in order to ascertain the truth of this contention.

I find it necessary to quote the same. At page 2 of the Judgment it is ordered:-

*"Baada ya Mahakama kugundua kuwa mdaiwa alikuwa na miji miwili na walitengana muda mrefu, Mahakama imempa mdai mhukumiwa (sic) Nyumba anayoishi kuwa ndio mali yake halali kutokana na kwamba tangu mwanzo hiyo nyumba inasomeka jina lake"*

Clearly, from the above extract from the Judgment, the plaintiff was given the house which she has been living and which bears her name. It is no doubt that the house includes the land thereon, the land in her name. The land in her name is the one in Exhibit P1 which includes the land the defendant is claiming.

During the hearing PW1 informed this Court that the disputed property belongs to Bi. Ashura Nyumba and that she has residential permit with her name as the owner. Moreover, in her testimony PW1 informed this Court that the property is one and the defendant was sold a part of it where formerly there was a mud hut built.

From the above testimony it is clear that the property at Gongolamboto was registered under the name of Bi. Ashura Nyumba (as per Exhibit P1).

Following the testimony and evidence given and tendered to Court (together with Exhibit P1 and P3) I find that the plaintiff, Bi. Ashura Nyumba, to be the lawful owner of the suit property at Gongolamboto.

To answer the question as to whether the Sale was valid or not, it is evident the Sale Agreement submitted as Exhibit D1 is between the defendant and Abdallah Kingwiti. The sale was of a suit property situated at Gongolamboto Mdhambarauni, which belonged to Bi Ashura Nyumba. Therefore, Abdallah Kingwiti had no title to pass. *Nemo dat quod non-habet*. This is a legal position established in our Courts. The same is also cemented by the Court of Appeal. In the case of **Farah Mohamed v Fatuma Abdallah (1992) TLR 205** the court held that

*"He who does not have a legal title to the land cannot pass a good title over the same land to another."*

Also see of **Melchiades John Mwenda versus Giselle Mbagu (Administratrix of the Estate of the Late John Japhet Mbagu and two others, Civil appeal No. 57 of 2018 CAT (Unreported))**.

Further, I note that the sale agreement raises doubt as DW2, being a manager of the defendant, signed as a witness for the seller, Abdalla Kingwiti. In his testimony he claimed that he did not know Kingwiti and also, he did not know the property being sold. That, he only signed as a witness of a seller because he was told to do so by his boss after the seller had no

witness. The question of who is competent witness arises in this scenario. Further, it raises doubt as to the validity of the agreement.

Also, the contract was said to be signed at Magomeni Kagera area on 01/05/2008 but was endorsed at Ukonga Primary Court on 02/06/2008. This also raises doubt.

Moreover, it was already agreed that the property belonged to Ashura Nyumba as per matrimonial cause 171/ 2008. Hence Abdallah Kingwiti sold a property belonging to Bi. Ashura Nyumba.

It is an established principle of law that one cannot sale what one does not have. See **Farah Mohamed Vs Fatuma Abdallah (Supra)**.

Therefore, the sale was invalid.

In addressing the issue of reliefs that parties are entitles to. This Court declares that the land in dispute to belong to the plaintiff.

The 2<sup>nd</sup> defendant is ordered to revoke the Right of Occupancy No. 82878 issued to the 1<sup>st</sup> defendant in order to exclude the encroached part.

The 1<sup>st</sup> defendant is ordered to vacate the suit premises and the wall be demolished.

As the general damages were not proved the same are not awarded.

The 1<sup>st</sup> defendant to pay costs of the suit.

Order accordingly.



  
**T. N. MWENEGOHA**

**JUDGE**

**27/07/2022**