

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

LAND CASE NO. 35 OF 2019

COCONUT LIMITED.....PLAINTIFF

VERSUS

**MOHAMED ALLY SELUHOMBO..... 1ST DEFENDANT
ANTHONY MBENA 2ND DEFENDANT**

J U D G M E N T

Date of last Order: 31/08/2022

Date of Judgment: 30/09/2022

T. N. MWENEGOHA, J:

The plaintiff in his amended plaint is praying for Judgement and Decree against the defendants as follows:

- a. A declaration that the Plaintiff is the lawful owner of the Plot No. 1 at Senzale Area in Bagamoyo District, Coast Region.**
- b. A declaration that the defendants' acts of trespassing onto the plaintiff's land illegally occupying it are wrongful and unjustifiable by law.**
- c. An order of immediate eviction of all the defendants from the land they are illegally occupying.**
- d. An order for defendants to jointly pay the plaintiff Tshs.**

600,000,000/= as mesne.

- e. An order for the defendants to jointly pay the plaintiff general damages to the tune of Tshs 300,000,000/=**
- f. An order for defendants to jointly pay the plaintiff punitive damages of Tshs. 300,000,000/=**
- g. Payment of interest of 15% on item (d) from the date of illegal occupation of the plaintiff's land to the date of filing and thereafter at the rate of 12% till the date of judgment.**
- h. Interest on the decretal sum at the court's rate from the date of judgment to the date of payment.**
- i. Costs of the suit and**
- j. Any other relief(s) this honourable court deems fit and just to grant.**

In the plaint the plaintiff claims to purchase the land measuring 72 acres, registered as Plot No.1 at Sanzale area in Bagamoyo District (suit land) from a company known as Pink Shark Limited. They alleged to have had peaceful enjoyment of the area until the year 2010 when the 1st defendant trespassed into his land claiming to be the lawful owner of the same. He then proceeded to sell the land to the other defendants. It was the plaintiff's narration that the matter was first reported at Magomeni Ward Tribunal and later appealed against at the District Land and Housing Tribunal for Kibaha, which nullified the Ward Tribunal's decision. He further alleged that the 1st, 3rd 5th, 27th, 32nd and 37th defendants proceeded to sell the plaintiff's land on various times to others individuals who are also defendants in this case.

In his Written Statement of Defense the 1st defendant contested the claim and raised a counter claim alleging that the defendant is an administrator of his late father, Ally Seluhombo. That, the said suit land estimated to be 20 acres belongs to Ally Seluhombo. That, after the death of Ally Seluhombo other two groups colluded to snatch the fertile land of the 1st defendant and they divided the said land into three pieces.

He therefore prayed for Judgment and Decree as follows:

- a. That the plaintiff is a trespasser of the 1st Defendant's land which is estimated to measure twenty (20) acres within Sanzale village in Bagamoyo.
- b. That the 1st defendant be declared the lawful owner of the said estimated twenty (20), acres which are Sanzale village in Bagamoyo and adjoined by airstrip and the farm of the Hon retired president of United Republic of Tanzania, Hon J.M Kikwete.
- c. This Honourable Court be pleased to issue and grant permanent injunctive order against the plaintiff and his agent not unlawfully enter and do anything within the 1st defendant's piece of land with estimate value (sic) of 20 acres.
- d. Demolition and eviction order against the plaintiff's unlawful unexhaustive development within the 1st defendant's land.
- e. Costs of this counterclaim.

On 9th March 2022 this Court ordered the matter to proceed *Ex-Parte* against the 2nd to 36 defendants for failure to enter appearance despite of being summoned.

During hearing the plaintiff presented six (6) witnesses and they filed witness statements and several exhibits.

On the other side 1st defendant had two (2) witnesses and also filed several exhibits the following exhibits. Moreover, the Court visited locus in quo. After closure of hearing of both parties' case, parties were allowed to file their final submissions, although only the plaintiff filed his submission.

The plaintiff was represented by Mr. Huruma Ntahema while the 1st defendant was represented by his son Msafiri Mohamedi Ally Seluhombo under the Power of Attorney.

During the final Pre-trial Conference parties agreed to have two issues for the determination

1. *Who between the Plaintiff and the Defendant is the lawful owner of the disputed land.*
2. *To what reliefs are parties entitled.*

Having gone through proceedings, exhibits and all the records of this case I will now determine the two agreed issues by both parties.

In providing evidence for the first issue *Who between the Plaintiff and the Defendant is the lawful owner of the disputed land* the plaintiff brought Juma Shabani Lugendo as their first witness (PW1).

Juma Shabani Lugendo testified that originally the suit land belonged to Pink Shark Limited. It was his testimony that he was a manager at Pink Shark Limited and he witnessed sale agreements in which his company bought land from unsurveyed land owners. He tendered five sale agreements admitted as Exhibit P1 collectively. It was his narrative that after they

received the sale agreements, they proceeded to other authorities include Land Authority for different proceedings. To prove this, he tendered survey plan of Sanzale, a Town Plan Map and Survey of Plot No.1 and 2. He also tendered Letter of Offer of Right of Occupancy of Plot No. 1 of Sanzale where all were collectively admitted as exhibit P2. He further presented a document titled Airdrome License dated 11.11.2012 which allowed Pink Shark Limited to operate Airdrome at Sanzale. The same was admitted as (Exhibit P3).

The witness further testified that the Plaintiff has a licence from Tanzania Civil Aviation [Exhibit. P6] to run airplanes in suit land. That, since 1996 they operated an airport at the suit land to transfer visitors from Zanzibar to Bagamoyo without any disturbance. That, they also cultivated fruits at the suit land. It was there testimony that in 2008 the Company sold a club it owned which was known as Livingstone Club to another Company known as Bob Investment. That, also Pink Shark Limited sold the suit plot where the Airport was located to Coconut Limited (Exhibit P4 collectively and P5).

It was the testimony of PW1 that as Pink Shark Ltd was also the owner of Coconut Limited, he was transferred to the new Company where he continue with the position of Company Secretary.

PW1 further told this Court that the suit land was invaded by Mohamed Ally Seluhombo and his sisters together with Anthony Mbena (Abdallah Mbena) where they trespassed the suit land and divided it in small plots to sell.

That the plaintiff filed a case to the Ward Tribunal where the decision was in plaintiff's favour. The matter was appealed to the District Land and Housing Tribunal (DHLT) which nullified the Ward Tribunal's decision for technicalities (Judicial Notice 1 Collectively). He further testified that, after that the defendant filed the Probate Cause for five-acre farm which is located at Sanzale (Judicial notice 2).

He submitted that, after the said Probate Cause the 1st defendant proceeded to sell the alleged land although it exceeded five acres he was granted in probate. He tendered sale agreements to that effect (Exhibit P7).

He further told the Court that he filed a case at DHLT and managed to get a stop order (Judicial Note 3), against Mr. Seluhombo. However, Mr. Seluhombo proceeded to invade the suit land despite of the oath he made in the presence of the Court that he will stop his invasion (Exhibit P8).

PW1 further testified to this Court that the situation got worse as the 1st defendant and his associates trespassed and invaded near the runway. Consequently, the airplanes could not land anymore as it was no longer safe. He asked the Court to grant his prayers contained in his pleadings.

PW1 testimony's was backed up by all the remaining five witness where they testified that the plaintiff is the owner of the suit land. Their testimony was also considered for this Judgment.

On the other hand, the defendant who had two witnesses, gave his account of the suit land. He was presented by Msafiri Seluhombo, his son who possessed a Power of Attorney.

Mr. Msafiri Seluhombo (DW1), testified that he was born at Sanzale, and that his father and his grandfather had a farm at the suit land. That, his grandfather has been living in the said suit land until his death.

He stated that the said farm was about fifty (50) to Sixty (60) acres and that his grandfather has been cultivating the farm until his death. That, upon his death, his father Mohamed Ally Seluhombo was Administrator of the same. He further claimed that they have lived in the area peacefully until between 2009 and 2010 when his father was sued for the said land at a Ward Tribunal of Magomeni Bagamoyo, where Juma Shabani Lugendo won; and on Appeal the decision was quashed.

It was his allegations however that the suit land is his (theirs) and Juma Shabani Lugendo is a trespasser. He also alleged that other people had also trespassed on the land including one Yusuph Kikwete and Salim Mgombelwa. The witness (DW1) tendered an agreement between Salim Mgombewa and Mohamed Seluhombo (Exhibit D1) to prove that Salim Mgombewa compensated Mohamed Seluhombo after the alleged trespass.

Upon cross – examination, the witness (DW1) agreed that his father has not lived in disputed land. That he was living in Maji Coast where he (DW1) was born and later on moved to Bong'wa in 1990 where his father is living to date. He confirmed also that he currently lives with his father and that he has never set eyes on his grandfather in his life as his family did not live with him and he had died before DW1 was born. That he came to know the demarcation of disputed land as he was shown by his father. However,

in re-examination, DW1 claimed that he lived in Sanzale until 1990 when they moved.

DW1 further told this Court that there was no house built at the suit land, that his family only cultivated the land. That, the family stopped farming in the suit land in 1996. That later on, in 2010, that is when the dispute began.

The witness (DW1) further informed the Court that Mohamed Ally Seluhombo was given Administratorship of the disputed land through Probate cause No. 2 of 2012 which they were advised to open after the dispute arose. That, through the Probate case Mohamed Ally Seluhombo was granted 5 acres.

Upon being cross examined as to why he invaded Yusuph Kikwete's and Salim Mgombewa's lands claiming that they are part of the 5 acres of inheritance, it was DW1's answer that the 5 acres were unsurveyed and that their land was much larger than the 5 acres they were given. He stated that he disagreed with the limit of 5 acres only granted by Court.

He admitted being declared a trespasser to Salim Mgombewa's 11 acres and Yusuph Kikwete's 7 acres through Court Judgment vide land Case No. 33 of 2015 and Land Case No. 91 of 2017 respectively.

In giving his part of testimony, DW2, one Muharami Hussein Gangale, told this Court that he knows both Mohamedy Ally Seluhombo and his father Ally Seluhombo. He told the Court that he is a brother-in law of Ally Seluhombo. That he has lived in the disputed land as he was also allocated

land by Mzee Ally Seluhombo. He claimed that Mzee Ally Seluhombo died in 1977 when he (DW2) was 17 years old.

He claimed further that Mzee Ally Seluhombo built a house there and planted cashewnuts. That he had never sold his land to anyone. He told the Court that he left Bagamoyo in 1978 for Dar es Salaam and returned back in 1996. That in 2000 that is when he obtained Ally Seluhombo's land and built a house there.

He further testified that he knows Mzee Ally Seluhombo's land which is about 20 to 21 acres and that Coconut Company's land is not within Mzee Ally Seluhombo's and that the land of Mr. Lugendo's company is not the same as Mzee Ally Seluhombo's land however, they have encroached into Mzee Ally Seluhombo's land.

In cross examination he informed the Court that he had never lived with Mzee Ally Seluhombo in Sanzale. That he was living in Bagamoyo Township (Mjini) and that he just visited them.

Upon being cross examined on the absence of a house mentioning in the Probate Ruling he claimed that Mzee Ally Seluhombo built a house however the house was completely broken down by then and that is why it was not mentioned in Probate case. He further claimed that Mzee Ally Seluhombo died while living at Sanzale and was buried at Sanzale. He offered to show the Court where the cemetery and graves are if it visited *locus in quo*.

When examined on his buying land from Mzee Ally Seluhombo, he said that he did not buy land from Mzee Ally Seluhombo but rather from his son

Mohamed Seluhombo, who sold him a quarter of an acres for 3 Millions Tanzania Shillings in 2000. He confirmed that the land he bought is also part of the land in dispute.

After considering the submissions, testimonies and all evidence tendered in Court and observation from visiting the sight in dispute, this Court analysed the same in order to determine who is the lawful owner of the disputed land.

It is trite law that the one who alleged must prove as provided under section 110 of Evidence Act, Cap. Also, in the case of **Antony M. Masanga vs. Penina Mama Magesi and Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (unreported)**, the Court of Appeal of Tanzania in underscoring the standard of proof in civil cases had this to say;

"Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil case the burden of proof lies on the party who alleges in his favour"

In the case at hand the plaintiff wants to be declared a lawful owner of Plot No.1 at Sanzale area of Bagamoyo Coastal Region. While at the same time the 1st defendant raised a counter claim and also wants this Court to declare him a lawful owner of estimated 20 acres within the same Plot 1 of Sanzale Village of Bagamoyo.

In the case like this where there is a counter claim, there is counter suit and that placed the duty of proving allegation to both parties. In the case at hand the plaintiff has managed to testify that they surveyed the land and have letter of occupancy to the suit land. (Exhibit P2)

On the other hand, the 1st defendant has letters of administration and a copy of Ruling of Probate Cause, giving him a right to 5 acres of unsurveyed land.

It is a trite law that the one whose name is in the land registry at the Ministry of Land is presumed to be the lawfully owner of the suit land. (Land Registration Act). According to section 2 of the Land Registration Act, Cap 334, Revised Edition, 2019 defines owner as follows;

"In relation to any estate or interests the person for the time being in whose name that estate or interest is registered"

Also, there is a bundle of authorities that are in favor of the position that the one with the Certificate of Title have the superior right over the one who has not.

In the case of **AMINA MAULID AMBALI & 2 OTHERS v. RAMADHANI JUMA {CIVIL APPEAL NO. 35 OF 2019(unreported)}** the Court of Appeal held that:

"In our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner..."

In the case at hand the first defendant relied on the letters of administration and a Ruling which appointed his father to be administrator of his grandfather. Although in the said Ruling it is indicated that the deceased had five-acre farm that is located at Sanzale while the defendant

is claiming 20 acres in his Counter claim. Further, DW1 admitted to use the same Ruling claiming land from two different persons apart from the suit land. Now the question is where are the five acres located? Is it in the suit land or in the other lands where the first defendant had dispute which were not determine in his favor? This raises doubt as to whether the 1st defendant owns land within the suit land.

Nothing that in his Written Statement of Defence, the 1st defendant claimed for a land with estimation of 20 acres that is in the suit land. Whereof, during the hearing, 1st defendant claimed that his grandfather had about fifty to sixty acres. This does not only increase doubt on his ownership of suit land but also creates confusion of claims.

The 1st defendant's Written Statement of Defence contradicts with the land granted in Probate Ruling. It is not certain whether it is 20 acres, 5 acres; or the 50 – 60 acres claimed in the testimony that is located in the suit land.

It was the testimony of DW2 that he knows the suit land. He claimed that Mzee Seluhombo's land is different from the plaintiff's land. That there are graves on the suit land. However, upon the visit to *locus in quo*, the 1st defendant identified his land to be within the plaintiff's land and also within PW5 and the PW6's land. Moreover, there were no cemetery or graves at the suit land.

The plaintiff having surveyed the land, having letter of offer, and license from aviation authority, have superior evidence compared to the one presented by the first 1st defendant. Thus, they have heavier evidence than the defendants. In the case of **HEMED SAID VS MOHAMED MBILU 1984**

TLR 113 HC, the Court said:

"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win"

The evidence brought by the 1st defendant in Court proves that his father owned 5 acres of land. However, it failed to prove where the said land is located.

The proceedings reveal that, DW1 admitted not knowing the location 5 acres given in probate as the land is not surveyed. He further claimed all the land to be his as they owned about 50 to 60 acres, contrary to his pleading of 20 acres.

It is evidence that the Court granted the 1st defendant right to 5 acres of land. However, it is evident the 1st defendant does not know where the land is located or is simply not satisfied with the 5 acres given and has decided to acquire land on his own power. This is evidence by the 1st defendant's actions of trespassing into other people's land as declared in land cases No. 12 of 2012 and No. 91 of 2017.

Also, through his testimony that he could not pinpoint the 5 acres as his land was unsurveyed and that he does not agree with Court's decision of granting them 5 acres as their land is bigger than that (60 acres).

Furthermore, this Court notes the inconsistency in evidence and testimonies given by both DW1 and DW2. From claiming to have lived in disputed land and later claiming to have lived somewhere else; to claiming the disputed land containing a structure of a house, to admitting that the

land to have no such structure; to declaring the presence of graves in disputed land and failure to show a single grave during a *locus in quo*; and mostly to the size of the land they are claiming from 50 to 60 acres, to 20 acres to not being sure of the size as the land is unsurveyed.

In addressing on the reliefs parties are entitled, to this Court declares that the plaintiff is the owner of the disputed property.

The Court further declares that the defendants are trespassers in the suit land and are ordered to vacate the same.

This Court notes that the plaintiff has not established his other claims including damages with the interest prayed for and mesne profits. Therefore, the prayers of the plaintiff regarding the same cannot be granted.

Costs of this case is hereby granted to the plaintiff.

It is so ordered.




T. N. MWENEGOHA

JUDGE

30/09/2022