

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

**CONSOLIDATED LAND CASE NO. 114 OF 2019  
AND  
LAND CASE NO. 151 OF 2020**

**THE REGISTERED TRUSTEES OF MASJID  
JUMUIYATIL ISLAMIA UBUNGO.....PLAINTIFF**

**VERSUS**

**OMARI SELEMANI MANGINGO.....1<sup>ST</sup> DEFENDANT**

**ZULFIKAR SELEMANI MANGINGO (As the Administrator of the  
Estate of the late SULEMANI HASSANI MANGINGO).....2<sup>ND</sup> DEFENDANT**

Date of Last Order: 12.04.2022  
Date of Judgment: 27.06.2022

**JUDGMENT**

**V.L. MAKANI, J**

On 02/12/2021 this court consolidated Land Case No. 114 of 2019 and Land Case No. 151 of 2020. The consolidation was based on the fact that the subject matter in these cases and the parties therein were the same. The principal claim in both these cases was ownership of land, namely Plot No. 152, Block A, with Certificate of Title No. 53802, Ubungo Kibangu, Ubungo Municipality, (the **suit property**).

Consequent to the consolidation, the plaintiff in Land Case No. 151 of 2020 became the 2<sup>nd</sup> defendant. The defendants prayed to withdraw the initial 1<sup>st</sup> defendant, Halima Kebbe in Land Case No. 114 of 2019. In that respect, the parties in the suit are as appearing in the title hereinabove.

The brief background of the matter is that the plaintiff herein claims to be the owner of the suit property where she constructed a Mosque after being granted the piece of land by the late Suleiman Magingo. That at the time of the grant of the piece of land the area was a squatter, so the plaintiff initiated a survey where it was done and a Certificate of Title was issued in its name. The outcome of the survey was to the effect that some of the buildings of the family members of the late Selemani Magingo happened to be within the surveyed land. The dispute arose when the defendants' family were told to demolish some of these structures claiming that the plaintiff was encroaching into their land. The main relief by the plaintiff is for an order to compel the defendants to demolish structures which have protruded into the suit property and remove the debris at their costs and costs of the suit.

On the other hand, the defendants admit that their father gave a piece of land to the plaintiff, but they claim that the piece of land given was not big and even when the plaintiff surveyed the land they were not involved as such part of the Mosque buildings have overlapped into their land. They claim further that, there are structures which have been built by the plaintiff which require demolition. The defendants claim that the structure on the left side of the Mosque and ¼ size of the Mosque building at the backside are within the estate of the late Sulemani Magingo and should be demolished. In the alternative the defendants claim a compensation to the tune of TZS 350,000,000/=, a declaration that the Certificate of Title to the suit property was fraudulently obtained and that the suit property belongs to the estate of Sulemani Magingo, general damages and costs of the suit.

The plaintiff in this case was represented by Mr. Victor Kessy, Advocate and the defendants were represented by Mr. Eliamani Daniel and Ms. Kondo, Advocates.

The issues that were framed were as follows:

- 1. Whether the plaintiff is the lawful owner of the suit property.*
- 2. Whether the defendants have trespassed in the suit property*
- 3. To what reliefs are the parties entitled to.*

The plaintiff's first witness was Said Athmani Chuma (**PW1**). He said he was one among the people who received the suit property from the late Selemani Magingo. He said the others who received the land were Yusuf Kebbe, Ally Kebbe, Ibrahim Suleiman Magingo, Hussein Lugunzo and Hassan Ally Semboga. He said the suit property was handed over to them by the late Suleiman Magingo and the witnesses were Rajabu Assenganya and Ibrahim Selemani Magingo. He said the suit land was handed to them as "Wakfu". He said the Mosque is built on the suit land and is boarded in the East by the road (TANROADS), in the south Halima Kebbe (the wife of the late Suleiman Magingo), to the West – Ibrahim and Omari Selemani Magingo and to the North Sheha Ismail and Mufti. He said the suit property was handed over to them by a written document (*Khati ya Kiwanja*) (**Exhibit P1**). He said "Wakfu" means giving something free of charge expecting reward from God. He said when something is given as "Wakf" no one can nullify the said grant and going against "Wakfu" is going against the law of the religion.

On cross-examination **PW1** said initially on the suit property there stood a Mosque, madrasa and a toilet but they demolished them and now there stands a big Mosque which is one storeyed building. He admitted that the place where the Mosque now stands had cemeteries and these have not been touched by construction. He said they were handed over the suit property in 1980 and the area initially given is the same, but they demolished the madrasa, teachers house and toilets and built a big Mosque. He pointed out that during survey and in the exercise of installing beacons the neighbours were involved and also the local government within the area, that is, *Mjumbe* and Chairman of *Serikali ya Mtaa*. He said a dispute arose after the installation of the beacons as Halima Kebbe built a toilet within the suit property. There was also another dispute in the West, but the said dispute was reconciled by the Ward and when another survey was conducted the beacons remained as before. He said the toilet of Halima Kebbe and the wall erected by the 2<sup>nd</sup> defendant has not been demolished they stand within the suit property. He said when the beacons were installed the late Selemani Magingo participated as he was still alive.

**PW2** was Hassan Ally Semboga. He said he is the Imaam of the Mosque. His testimony was more or less similar to that of **PW1**. He just emphasized that he was not involved in the exercise of survey because the Secretary and the Committee of the Mosque (*Kamati Tendaji*) took care of that. He said the dispute started after the death of the late Selemani Magingo. He said there were meetings of reconciliation and court mediation but all failed because the defendants wanted the demolition of the Mosque while the Mosque wanted the boundaries to be respected.

**PW3** was Hamisi Abdallah Mchabwa. He said he was a member of the Board of Trustees. He said he has been a member since 2016 to date as per the letter from RITA (**Exhibit P2**). He said **Exhibit P2** reflects the Trustees and one namely Kitwana K. Kinyogoli who is deceased (**Exhibit P3**). He said there is trespass from Halima Kebbe in the South and Omari Magingo in the West, in that the former has built a toilet and the latter has built a wall within the Mosque area. He said the Chairman is the custodian of the properties of the Mosque and the late Kitwana Kinyogoli was the Chairman. He said they are currently known as Masjid Jumiyyatil Islamia Ubungo, Kinondoni as per the official search report of RITA (**Exhibit P4**). He said they were

two surveys and in 2016 was when the second one was conducted by the government valuer and they were documents by the relevant authorities from the Municipaal Council such as **Exhibit P5** (*Yah: Kurudisha Mipaka Kiwanja Namba 152 Kitalu "A" Ubungo*). He said the letter was directing the beacons to be returned. He said after the re-survey the Trustees became the custodian of the properties of the Mosque the movable and immovable and a Certificate of Title was granted (**Exhibit P6**).

On cross-examination **PW3** insisted that when the beacons were installed the late Selemani Magingo was still alive as the survey of the plot started way back in 1988. He also confirmed that there is a toilet in the south built by Halima Kebbe and a wall built by the children of the late Suleiman Magingo and also their houses have been improved as such the paths have been blocked. He said the suit is a one storey building and is within the plot though construction is still going on.

The defendants' first witness was Monica Mjunga (**DW1**). She said she knew the late Selemani Magingo because she was the Assistant Local leader within the area (*Msaidizi wa Mjumbe*). She said the wife of the late Selemani Magingo was Halima Kebbe and she is now

deceased. She said the late Selemani Magingo gave land to the Mosque which measured 18 x 25 as a gift. She said the handing over was made orally on the basis of trust. He said initially the worshippers built a mud hut (*Banda la udongo*) which has been demolished and the leaders have built a bigger Mosque which covers an area bigger than what they were given. She said the Mosque has also constructed on top of graves. She admitted that when the late Selemani Magingo was alive there was no dispute between the family and the Mosque.

On cross-examination **DW1** said she was the only witness during the handover, the wives and children of the late Suleiman Magingo were not present and the late Suleiman Magingo was the one who measured the land by paces of 18 x 25. She said there were graves of children and the same were outside the plot given by the late Selemani Magingo at the northern side of the Mosque. she said the Mosque has trespassed in the land of the family because the new Mosque is bigger and has been extended than that of before.

**DW2** is the second defendant, Zulfikar Selemani Magingo. He said he is the administrator of the estate of his father the late Sulemani Magingo. He tendered as exhibits the Death Certificate (**Exhibit D1**)



and the Letter of Administration (**Exhibit D2**). He said the dispute is about trespass of the Mosque in their land. He said there was a case at the Ward Tribunal in 2004 that the Mosque had installed beacons without the involvement of the family and neighbours. He said the plot given to the Mosque by their father was small it was about 18 x 25 paces. This small piece of land was handed over to the elders of the mosque and not individuals. He said the Mosque was small because the piece of land was also small. He said the toilet by their mother Halima Kebbe was built before the Mosque. He said the Plot was handed over verbally because there were no documents that were given to them. He also said he does not recognise **Exhibit P1** because his father did not have such a signature. He said he does not know the person by the name Kasenganya. He said the Mosque has been built on Selemani Magingo's land and so the extended land should be returned to the estate of the late Selemani Magingo or otherwise they should be compensated TZS 350,000,000/= and costs of the case.

On cross examination he said he knows that the plot was handed over to people, but he does not know them. He was told by his father about the paces of 18 x 25 of land given to the Mosque. He said he

remember seeing the surveyors and they involved them. He emphasized that the previous Mosque was small but the new Mosque which was built between 2012 to 2017 is big and it has extended to the family land and it requires the toilet to be demolished including frames and wall. On clarification he said his brother the late Ibrahim Magingo was one of the Trustees of the Mosque.

Omari Selemani Magingo, the first defendant was the third witness for the defendant (**DW3**). He said the late Selemani Hassan Magingo and the late Halima Kebbe were his father and mother respectively. His testimony was not far from that of **DW2**, but he insisted that the toilet which is subject for demolition is being used by the family and that his father told him that he offered the Mosque land measured at 18 x 25 paces and there was no handing over documents. He pointed out that almost  $\frac{1}{4}$  of land has been taken as the new Mosque has extended towards the family land, and part of their land has been taken away. He said there was a reconciliation, and it was put in writing vide a letter of 2015 (**Exhibit D3**). The implementation was for them to fence the area, but the Mosque did not agree to the fencing. He prayed for the claim by the Mosque to be dismissed with costs.

On cross examination he said what was given to the Mosque is not what the surveyors has done because the family members were not involved. He said he did not recognise the people who were handed over the land by his father because they are different from the ones who were in reconciliation. He said he recognises the Trustees but not as leaders of the Mosque who were handed over the land to build the Mosque. But on the other hand, the witness said he knew all the Trustees except one Iddi Juma Salum and they were in the meeting in **Exhibit D2**.

After the evidence the court visited the locus in quo and Counsel filed their final submissions as was ordered by the court.

Before I proceed to consider the substantive issues, I find it imperative to determine the issue of the admissibility of **Exhibit P1** which in the course of the hearing its admissibility was challenged for various reasons but was tentatively admitted with caution that the validity or admissibility of the document would be determined in the judgment. I have taken asylum in this procedure for purposes of accelerating trials by admitting a document tentatively with a note

that its admissibility would be considered in the judgment (see the case of **Salmin Mbaraka Salim t/a East African Investment vs. Permanent Secretary Ministry of Works & Another, Land Case No. 1 of 2015 (HC-Land Division) (unreported)**).

The plaintiff herein filed a Notice to Produce and Rely on Secondary Evidence under section 67(1) and 68 of the Evidence Act. It was Mr. Kessy's argument that the document is not in original because the custodian of the documents is deceased one Kitwana Kambi Kinyogoli and an Administrator has not been appointed so the said document could not be found. He said this information is also in the preamble of the Notice itself. On his part Mr. Eliamani objected to the admissibility of the documents saying that his colleague has lumped the documents together those which are in possession of the deceased and those to be relied upon as secondary evidence. In my view, I find the objection without merit because under section 67(1) (c) of the Evidence Act a secondary evidence can be admitted when the party offering evidence cannot produce the original within a reasonable time. In this case the notice was clear and so was Mr. Kessy in his submissions, that the custodian of the document was deceased. More so, under section 51 (1) Land Disputes Courts Act,

CAP 216, RE 2019, the trial judge has a discretion to, regardless of any law governing production and admissibility of evidence, accept such evidence and proof which appears to be worthy of belief. It is on this account that I will, as I hereby do, disregard the objections that was raised by Mr. Eliaman and proceed to admit the said **Exhibit P1**.

Having disposed the preliminary issue, I will now proceed with the substantive matter.

It is trite law that whoever alleges must prove. This principle is embodied in section 110 of the Evidence Act CAP 6 RE 2019 and has been emphasized in the case of **Anthony M. Masanga vs. Penina Mama Mgesi & Lucia (Mama Anna) Civil Appeal No. 118 of 2014** (unreported) where the Court of Appeal stated:

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

In this present case the plaintiff has the duty to prove that he is the owner of the suit property and further that the survey conducted leading to the issuance of the Certificate of Title was proper. On the other hand, the defendants must also show that indeed the Mosque

building has extended to the land within the estate of the late Sulemani Magingo. What this court is to decide upon is whether the burden of proof has been sufficiently discharged by the parties.

The first issue is whether the plaintiff is the lawful owner of the suit property. It is the law that prima facie proof of ownership of land in a surveyed area is a certificate of title or at least a Letter of Offer. According to Section 2 of the Land Registration Act CAP 334 R.E 2019 the term owner has been defined to mean:

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

The above legal position was illustrated in the case of **Salum Mateyo vs. Mohamed Mateyo (1987) TLR 111** where the court held:

*"This means, any presentation of a registered interest in land is prima facie evidence that the person so registered is the lawful owner of the said land."*

Also, the Court of Appeal in **Amina Maulid Ambali & 812 Others vs. Ramadhani Juma Civil Appeal No 35 of 2019 (CAT Mwanza)** (unreported) observed:

*"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 unless it is proved that the certificate was not lawful obtained."*

The plaintiff's proof of ownership of the suit property is the Certificate of Title (**Exhibit P6**) which was duly tendered by **PW3** the Trustee of the plaintiff. On the other hand, the defendants are claiming that the said Certificate of Title was not obtained legally. In his final submissions, Mr. Eliaman submitted that there were illegalities in the transfer of the property from "wakfu" to the plaintiff contrary to section 80(4) of the Land Registration Act, in that, the registration ought to have been in the name of the *Wakf Commission* and not the plaintiff. Indeed, that may be the procedure, however, there is no witness who was called by the defendant to lead the court on the procedures related to land under "*Wakf*". There was also no proof that the Certificate of Title was illegally granted. It was expected that the defendants would have called a witness from the Commissioner for Lands in the Ministry of Lands, the authority that granted the Certificate of Title, to lead the court on the illegality of the procedure in the grant of the said Certificate of Title to the plaintiff. There was also no proof that there were set conditions restricting the plaintiff from being issued with a Certificate of Title because it was land under "*Wakf*". The grant of the Certificate of Title was only objected to because it was alleged that the defendants were not involved in the

survey, but as said above, the proper persons to have addressed this issue were the Ministry of Lands.

Mr. Eliamani argued that possession of a Certificate of Title is not *ipso facto* proof that the possessor is the lawful owner, and he cited the case of **Melchiades John Mwenda vs. Gizele Mbaga (Administratrix of the Estate of John Japhet Mbaga – Deceased) & 2 Others, Civil Appeal No. 57 of 2018 (CAT-DSM)** (unreported). However, the cited case is distinguishable as it was dealing with a Certificate of Title which was lost/stolen and in lieu thereof a duplicate was issued hence there were two subsisting Certificates, and all were presented in court. In those circumstances, the court had to decide which one was lawfully obtained. In the present case, there is only one Certificate of Title issued to the plaintiff and there are no allegations of theft or otherwise. So, the cited case is not of assistance to the defendants.

The defendants also claimed that the surveys that were conducted were not proper, and they were not involved. But it is a known fact that a survey precedes the issuance of a Certificate of Title and if the said Certificate was issued it consequently means that there were no



problems. Even the coordinates by the surveyor of the Municipal Council Kinondoni (**Exhibit P5**) and those in the Certificate of Title (**Exhibit P6**) are the same. The defendants were aware of the survey as they were also copied the letter from Kinondoni Municipal Council **Exhibit P5**. In fact, DW2 also admitted in his testion that when the survey was conducted, he was present. In any case, if the defendants were countering the surveys and the grant of the Certificate of Title then witnesses from the Commissioner for Lands and/or Kinondoni Municipal Council would have assisted their case. In the absence of these witnesses then the claim that the surveys were improper and that the Certificate of Title was illegally granted remain unproved. The court also visited the locus in quo and taking into account the survey plan in **Exhibit 6** and what is on the ground indeed, the wall structure by the 2<sup>nd</sup> defendant and the toilet by Halima Kebbe the mother of the defendants is within the confines of the suit property. Subsequently, when the evidence is put on balance, it leans in favour of the plaintiff as the owner of the suit property, and I hold as such.

The second issue is whether the defendants are trespassers in the suit property. In his final submissions Mr. Kessy posed the issue in another way as to whether the defendants disposed the suit property.

He further stated that the suit property was given to the plaintiff by the late Selemani Hassani Magingo who was the lawful owner for construction of a Mosque and that during his lifetime he willingly gave the said suit property to the plaintiff, the title therefore legally passed to the plaintiff. On his side Mr. Eliamani for the defendants, said the plaintiff was an invitee to the suit property and according to the case of **Mussa Hassani vs. Barnabas Yohana Shedafa, Civil Appeal No. 101 of 2018 (CAT)** an invitee cannot claim ownership of the said land and he argued that the plaintiff was invited on the suit property by the late Selemani Magingo the father of the defendants and so they cannot be trespassers on their own land.

There is no dispute that the suit property was initially owned by Selemani Hassan Magingo and he gave it to the plaintiff vide **Exhibit P1**. The defendants and their witness **DW1** do not dispute this fact but they allege that the size of the land given was only 18 x 25 paces. This allegation by the defendants and **DW1** has not been proved; it is only their words against the whole world. Mr. Eliamani claimed that the plaintiff was an invitee, but the circumstances related to an invitee presumes that the land can be returned to the host. In this instance, the suit property was given to the plaintiff by the late Selemani

Hassan Magingo in the presence of the Elders of the Mosque and also in the presence of his son Ibrahim S. Magingo (see **Exhibit P1**) and the transaction had no indication whatsoever that the plaintiff would return the suit property hence an invitee. In that respect the land cannot be returned to the estate of the late Selemani Hassan Magingo as title has already passed from him to the plaintiff and accordingly the plaintiff cannot be a trespasser in her own land. In other words, having established that the plaintiff is the owner of the suit property, the defendants cannot be owners of the suit property hence trespassers.

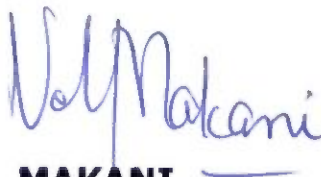
The last issue is to what reliefs are the parties entitled to? Following that the plaintiff has been declared the owner of the suit properties the reliefs that were prayed by the 2<sup>nd</sup> defendant in Land Case No. 151 of 2020 have no legs to stand on and are hereby dismissed.

In the result, it is hereby decreed and declared as follows:

- (a) the plaintiff is hereby declared the lawful owner of the suit property namely, Plot No. 152, Block A, with Certificate of Title No. 53802, Ubungo Kibangu, Ubungo Municipality, Dar es Salaam.

- (b) The defendants are ordered to remove and/or demolish any structure within the suit property.
- (c) Tprayers by the 2<sup>nd</sup> defendant (the plaintiff in Land Case No. 151 of 2020) are hereby dismissed.
- (d) The costs of this suit shall be borne by the defendants.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**27/06/2022**