

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

LAND CASE NO. 249 OF 2021

JOSHUA JOYBOY MUNGEREZA.....1ST PLAINTIFF

AGNES KOKULEBA MUNGEREZA.....2ND PLAINTIFF

VERSUS

SOPHIA MOHAMED FARAHANI..... DEFENDANT

JUDGMENT OF THE COURT

28/06/2022 & 26/07/2022

GWAE, J

This particular suit, I am reminded of the slogan that, “a man chases a woman till she catches him”. It is in this plain saying, that the man is always condemned to have been oppressor to the woman but on the other side of the coin, it is said the man is tricked to care for woman all of his life and her offspring.

The Plaintiffs, **Joshua Joyboy Mungereza** and **Agnes Kokuleba Mungereza** who are husband and wife respectively claim to have jointly acquired Plot No. 20086 and Plot No. 20088 situated at Wazo Hill, within Tegeta, Kinondoni Municipal Council in Dar es Salaam Region (hereinafter

Suit Plots) which were in unsurveyed land in 2000.

The suit plots were alleged to have been bought in the year 2000 by the Plaintiffs. Subsequent to the purchase of the unsurveyed farm, the plaintiffs developed the suit plot by building the storey house that is from 2010-2013 and later two houses which were used for hostel purposes. According to the plaintiffs' averments, the dispute arose when defendant, Sofia Mohamed Farahani was appointed as a matron and students' food provider in 2005 following their past friendship when she was selling 1st plaintiff's milk at Kinondoni area

Nevertheless, the dispute between the 1st plaintiff and defendant when they started condemning each other leading to the institution of a Land Application No. 48 of 2019 at Wazo Hill Ward Tribunal by the defendant claiming to be a lawful owner of the disputed premises. The defendant's case was decided in favour of the 1st plaintiff by the Ward Tribunal but on appeal by the defendant in the District Land and Housing Tribunal at Kinondoni, the proceedings, decision and award of the trial tribunal were quashed and set aside for want of pecuniary jurisdiction

On the other hand, the plaintiff seriously alleged that, the defendant fabricated two sale agreements with a view of establishing that she bought the suit plots from Asha Omary on the 19th March 1998 and from Omary Mktivya on the 27th March 1998 causing chaos to the plaintiffs.



That, the defendant has refused to vacate the suit plots despite of different reminders. Now the plaintiff has decided to file the present suit praying for judgment and decree against the defendant as follows: -

- (i) A declaratory order that the Plaintiffs are legal owner of the disputed land with Certificate of title for Plots No. 20086 and No. 20088 situated at Wazo Hill, within Tegeta, Kinondoni Municipality in Dar e salaam Region.
- (ii) A declaratory order that the Plaintiffs own the disputed land jointly and together.
- (iii) A declaratory order that the defendant has no any legal right(s) over the disputed land and thereby a stranger.
- (iv) A declaratory order requiring the Defendant to vacate from the disputed land.
- (v) An order compelling the defendant to pay rent to the Plaintiffs from January, 2018 to the date of satisfaction of the Court's Decree.
- (vi) An order for payment of all loses caused by the Defendant for the whole period she has refused to vacate since from January 2018 to date.
- (vii) Payments of general damages as may be assessed by the



court.

- (viii) Payments of decretal sum of 5% since from filing of this suit until fully satisfaction of Court's decree and;
- (ix) Payment of any other reliefs as the Court may deem fit to grant.

In her written statement of defense, the defendant disputed the plaintiffs' claims, it is her stand that the plaintiffs have never owned the disputed premises in anyway and that, the title deed attached have been fraudulently obtained. She further averred the 1st plaintiff was involved on the issue of students' Hostel operations on the basis that he was her concubine / cohabitant as by then. She also averred that the 2nd defendant had never been involved in acquisition of the suit plots or development or did any supervision of the disputed premises.

During hearing, both parties were duly represented throughout the trial by Mr. Akiza Rugemalira and Mr. Denis Julius who appeared in the capacity of advocates for both plaintiffs and the defendant respectively. Before commencement of the trial, the following issues were consensually framed;

1. Who is the rightful owner (s) of the disputed plot No. 20086 and 20088 situated at Tegeta Wazo Hill, Kinondoni



Municipality within Dar es Salaam Region?

2. What reliefs parties are entitled to.

In establishing their suit, the plaintiffs summoned a number of ten witnesses and tendered twenty six (26) exhibits namely; Marriage Certificate (PE1), 2 Certificates of Titles registered on 1st July 2021(PE2) Collectively, a letter to serikali ya mtaa to open Aposel hostel (PE3), agreement to compensate for pavement-PE4, Bricks invoice (PE5), Medical chits (PE6), Tenancy agreements (PE7), Loss Report on loss of documents-PE8, Judgment of the this court vide Land Case No. 124 of 2019 (PE9) Judgment of the Ward Tribunal and that of DLHT (PE10), Receipt -PE11, Proof of business name (PE12) and Letter to serikali ya mtaa notifying them of opening of hostel (PE13)

There were also; a complaint letter to change name in water service (DAWASCO)- PE14, a complain letter to TANESCO on change of meter no. from the 1st plaintiff to defendant- PE15, Compensation collection -PE16, Criminal case Judgments/order of the Kawe Primary Court, D.C and this court (P1E7) Collectively, summons to District Commissioner office- PE18, Complain letter to DAWASA and its response-PE 19,Minute for water project held on the 24th September 2007 (PE20), Photos together with RB-PE 21, Property tax demand notes one for Kunduchi and other for



Wazo property and its payment receipts indicative that the 1st plaintiff is owner (PE22) ,Bank statement- PE 23, Application form filed at the Ward Tribunal-PE24, a sale agreement between the defendant and one Asha Omari of 19th March 1998 (PE25), Defendant's complaint letter dated 9th March 2021 to Serikali ya mtaa after her form being retained for the intended survey (PE26).

Essentially, the plaintiffs are utterly claiming to be the lawful owners of the suit land and its developed structures thereof and in addition they are alleging that the defendant was just invited to work in the suits plots as the matron in the Aposele hostels and that after the close of the students' hostel, the defendant humbly requested the 1st plaintiff to remain in the suit plots as she had some family issues, grown up sons. Surprisingly, the defendant has refused to vacate the suit plots on allegation that she is the lawful owner of the suit plots.

Although PW9 (1st plaintiff) who is the 1st Plaintiff contradicts the whole testimony of other witnesses by stating that he never had love affair with the defendant and also never employed the defendant as the matron contrary to other witnesses especially PW1 who stated that she was matron at the hostel and had affair with him way back before shifted to the suit land. This PW9 pointed that he was introduced to the seller who is Asha Omari by the defendant.

On the other side, the defendant paraded a number of six witnesses during her defense namely; Datis John, Assistant to DC-Kinondoni (DW1), the defendant (DW2), Khadija Omari, a daughter of Omari Mkivya and the sister to Asha Omari whom the defendant and 1st plaintiff are alleging to have bought the suit plots from them respectively (DW3), Juma Amiri one who testified to have hired in roofing one of the houses at the disputed plots (DW4), Geoffrey Mwansonjo, Land Officer (DW5) and one Mussa Ally, one who participated in the survey during the so called urasimishaji (DW6).

The defence also tendered a total of four (4) exhibits in order substantiate its evidence exhibits namely; two Sale agreements of 1998 (Received as DE1 Collectively), A receipt on survey contribution dated 24th January 2016 (DE2), 4 receipts for bricks dated 20th Nov.2011, Dec. 2011 and January 2012 making a total of Tshs.7,750,000/= (DE3) and Property Tax Demand note 2014/2015 dated 12th February 2015 addressed to the defendant and issued by Kinondoni Municipal Council which is indicative that, the defendant is the lawful owner of the property (DE4).

In essence, the defendants' witnesses (DW2, DW3&DW4) testified to the effect that, the suit plots belong to the defendant as she bought the suit plot in 1998 from Said Omary Mkivya. DW1 clearly admitted to have a support of the 1st Plaintiff as her lover. They also stressed that

Asha Omary had no land at the suit plot but represented her father in the initial sale of the suit plots (DW3). The defence also testified through DW3 and DW4 that the 1st plaintiff and defendant were considered as husband and wife respectively. On his style, DW5 testified that the plaintiffs unprocedurally obtained certificates of titles since the dispute between them and defendant was yet to be resolved that is why they were directed to return the same.

After closure of the parties' evidence, the Parties' learned advocates sought and obtained leave to file their closing submissions which were subsequently filed in accordance with the court schedule dated 23rd June 2022. I shall accordingly respect and carefully consider the parties' final submissions in the course of determining each issue. I however I thank the learned counsel for their parties for the fruitful contributions towards making of this judgment.

In the 1st issue above, who is the rightful (s) of the disputed plot No. 20086 and 20088 situated at Tegeta Wazo Hill, Kinondoni Municipality within Dar es Salaam Region.

According to the evidence adduced by both sides, including PW1, it goes without saying that the 1st and 2nd plaintiff are husband and wife respectively as exhibited by PE1. Therefore, the plaintiffs' marriage was

contracted in Christian religion.

I would not like be curtailed by the issue on whether the 1st plaintiff and defendant were husband and wife since it is sufficiently established that the defendant and 1st plaintiffs were concubines. This position was supported by the parties' witnesses, PW1, DW3, DW2 as well as documentary evidence especially PE10, judgment of the ward tribunal delivered on the 20th May 2019. Principally, the existence of Christian Marriage automatically binds the parties to the marriage contract and therefore they cannot contract another marriage while the original is still subsisting. This is as per section 11(5) of the Law of Marriage Act, cap 29, Revised Edition, 2019 which provides that,

'No marriage between two Christians which was celebrated in a church in Christian form may, for so long as both the parties continue to profess the Christian faith, be converted from monogamous to polygamous and the provisions of this section shall not apply to any such marriage notwithstanding that the marriage was preceded or succeeded by a ceremony of marriage between the same parties in civil form or any other form.'

Examining the parties' evidence, it has been proven by both sides that the 1st Plaintiff and the defendant were lovers for quite a long time however their relationship does not constitute a legal marriage, they are

just concubine.

(See the case of **Bi Hawa Mohamedi v. Ally Seif (1983) TLR 24**, and the case of **Antony Felician v. Shani Kakulu**, Civil Appeal No. 16 of 2020 (unreported).

Having briefly explained the status of the relationship between the 1st plaintiff and defendant as herein, I turn to the rival and contentious issue in regard to the acquisition of the suit plots. PW1 testified that, the suit land in which the suit premises was bought by her husband (PW9) and that she contributed to its developments using her salaries and the loans which transferred some amounts to her husband for developing the suit plots these pieces of evidence were amply supported by the plaintiffs' witnesses (PW2, PW3, PW4, PW6 to PW10)

To counter the plaintiffs' evidence, the defendant strongly testified that she personally bought the suit plots from Omari Mkivya, the late father of DW3. She added that the 1st plaintiff's involvements in the suit land was due to their love affairs. In substantiating her evidence, she tendered, two sale agreements (DE1) and Property Demand Note (DE4). She summoned witnesses to establish that she was the one who built the 1st floor and paid for it (roofing) (DW4) and DW3.

Before I start determining the 1st issue by objectively assessing the credibility otherwise of the parties' evidence, I would like to be guided by



the judicial jurisprudence in **Anthony M. Masanga versus Penina** (Mama Ngesi) and another, Civil Appeal No. 118 of 2014 (unreported), cited with approval in the case of **Re B** (2008) UKHL 35, where Lord Hoffman in defining the term balance of probabilities held that:-

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it; a value of 1 is returned to and the fact is treated as having happened".

In the light of the above authority, it is the plaintiffs' duty to prove at the balance of probabilities that they are lawful owners of the suit land in exclusion of the defendant.

From outset that I have noted that both parties endeavored to rely on various receipts such as purchase of building materials (PE5 & DE3), attendance at the meeting on the planned survey "urasimaishaji" (DE20), complaints on change of name in the electricity and water meters (PE19 & PE15), payment for survey (PE11) and other receipts (PE12). As

was rightly adduced by the land officer and supported by documentary evidence (DW5 & PE19) that, ownership of landed property is not proven by a mere being a bearer of certain payment receipts or water meter or electricity meter. This kind of documents are merely persuasive. In this regard I am persuaded by the decision of this court (**Mruma, J**) in the case of **Hamisa Athuman vs. Halima Mohamed**, Land Appeal No. 28 OF 2018 where it was stated;

"It should be noted that evidence of paying land rents or possession of receipts showing that one paid land rents in respect of a certain plot is not evidence of ownership of that plot."

In observance of the documentary evidence adduced by the parties and the judicial decision quoted herein, it follows that, some documents tendered and so received by the court cannot automatically bind or guarantee or enable the court to safely and certainly determine the rightful owner of the suit premises between save that, they are persuasive in that regard.

The plaintiffs' witnesses did not rely on the said documents whose bearers are the 1st plaintiff but also two Certificates of Title (PE2) showing that plaintiffs being the husband and wife jointly owned the suit land while the defendant relied on the sale agreement as her proof of ownership of

the suit property. I am alive of the cherished principle that a person whose name is registered and a certificate of title (Right of Occupancy) is issued in his or her name is the one who is the lawful owner of the land so registered whenever there is dispute between two persons over the same property. The position has been consistently stressed in various judicial decisions for instance in the case of **Salum Mateyo v. Mohamed Mathayo** (1987) TLR 111 where it was held inter alia;

"It seems to me clear that in law, the appellant in whose name the suit premises were registered was the owner. I am fortified in this view by section 2 of the Land Registration Ordinance, chapter. 334 which defines "owner" in relation to any estate or interest as the person for the time being in whose name the estate or interest is registered."

(See the decision of the Court of Appeal in **Amina Maulid Ambali & 2 Others vs. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (unreported) and **Sofia Mohamed vs. Joshua Joyboy Mungerza and Joseph Mungereza**, Land Case No. 124 of 2019 (unreported) cited by the learned counsel for the plaintiffs where this court held that, any presentation of registered interest in land is prima facie evidence that the person so registered is the lawful owner. In the latter decision the titles were obtained in 2019 May and 2019 September whereas in this suit, the



said certificates of titles were issued on 1st July 2021.

Basing on the above case law and statutory provision, I am made to believe in that the plaintiffs' ownership would not be questionable or undefeated if they procedurally obtained the said two certificates of titles (PE2). In our case, I am not persuaded at all if the plaintiffs legally and without fraudulent intent obtained the said certificates of titles. I am holding so due to the following reasons

1. That, the plaintiffs particularly the 1st plaintiff was aware of the existence of the dispute over the same plots since 2019 when the defendant lodged a land dispute in the ward tribunal on 20.5.2019 vide Application No. 48 of 2019 (PE10) followed by Criminal Proceedings (PE17 &PE21 of 28/5/2019) and this suit filed on as well as the complaints by the defendant to the Chairperson of formularization of squatter land, "Urasimishaji" copied to various Government Offices (PE26)
2. That, the Order of the District Land Housing District Tribunal issued on 26th June 2020 neither declared the plaintiffs to be the rightful owners nor the defendant save to revert to the original status denoting that since the defendant was in actual possession of the suit land and since she refused to vacate claiming to be the owner of the same, the plaintiffs could not



apply for grant of certificates of titles till the dispute is finally resolved (See PE24-Application Form No.5). Thus, the issue ownership was yet to be resolved.

It is my considered view that, the acts of applying and obtaining of certificates of titles by the plaintiffs from the responsible authority without disclosing the existence of the dispute between the plaintiffs and the defendant to the authorities as far as the ownership of the plots is concerned constitutes fraud or ill intend on their part since the dispute over the suit premises was yet to be heard and determined by a competent court. I would perhaps wish to quote part of the decision of the Court of Appeal in **Amina Maulid Ambali and 812 others v. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (unreported), cited by the plaintiffs' counsel where it was held among other things 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 unless it is provided that the **certificate was not lawfully obtained** (emphasis mine)".*

In our case, taking into account that, the plaintiffs were aware of the dispute that exists between the defendant and them but he proceeded



applying for the certificate of titles as if no dispute over the suit property was in existence. That was wrong as rightly testified by DW6 who stopped conducting a survey of the suit plots after having noticed that, there was contentious issue as to who is the rightful owner between the 1st plaintiff and defendant as well as DW5 who said to have issued a letter to the plaintiffs requesting return of the pending settlement of the dispute either administratively or by way of adjudication. DW5 added that DE8-loss report and affidavit contained documents that were not sent to the land office. If this kind of acquiring certificates of titles is left without being condemned, unfaithful persons may likely to prejudice the rights of innocent and lawful owners of pieces of land in our country.

On the other hand, the defendant strongly relied on **Exhibit D1** (2 sale agreements) the one dated 19th March 1998 showing that she bought the suit plots from Asha Omari measuring 1/4 acre and the one dated 27th March 1998 showing that she bought her land from Omari Mkivya as conspicuously pleaded in her written statement of defence (See para. 2). Both the sale agreements are on the landed property of the same size. On her testimony, DW2 testified that the said area was of Omari Mkivya and Asha Omari represented his father during transaction. According to my opinion, the evidence of DW2 is self-explanatory as to the one whom she paid first instalment that is Asha Omari who demanded more extra

amount (Tshs. 10, 000/=) and after the full payment of the sale price (Tshs. 70, 000/=) of the farm, she met the owner and concluded the contract.

As the 1st plaintiff testified that he bought the farm in the year 2000 from the same person by an aid of the defendant and the same plaintiff is the one who produced PE25 to establish that the defendant did not buy the same from Asha Omari to contradict her testimony, in my considered opinion that, the defendant's explanation is sufficient as to why there are two sale agreements relating to the same subject matter taking into account that, the 1st plaintiff admitted to have been enabled by the defendant to meet the said Asha Omari. For the sake of clarity part of the 1st plaintiff's testimony is reproduced herein under

"It was the defendant who assisted me to meet the said Asha Omari, seller of the disputed land".

In light of the quoted part of the evidence adduced by the 1st plaintiff, it follows that, the one who was familiar with the said Asha Omari was undisputedly the defendant. If there was a sale of the suit plots to the 1st plaintiff in 2020, then the defendant is the one who purchased the same earlier (1998).

I have further examined the Police Loss Report (PE8), there are no descriptions as to the location of the sale agreement reportedly stolen by

the 1st plaintiff, no mentioning of the seller, date of transactions just like those sale agreements tendered by the defendant. That being the court's findings herein, I thus hold that, had the defendant not been in possession of the suit land since 2000s and or her testimony not supported by the daughter and sister of the late Asha and Omari respectively (DW3) as well as by the 1st plaintiff himself, the weight of the sale agreement (PE1) would not have been considered to be credible.

The issue of source of income of either of the parties, in my view, was not the contentious issue between the parties. Nevertheless, the parties have attempted to establish it during trial. I am saying so simply because the matter for determination before me was on the ownership of the landed property and not division of property upon termination of concubinage which is purely a civil matter. This court happened to face the similar situation in the case of **Hoka Mbofu vs. Pastorey Mwijage** (1983) TLR 286, when the matter commenced before primary court for division of property acquired during concubinage, on appeal to District Court, it was found the matter to be matrimonial proceeding however this court (Mushi, J) reversed the decision of the 1st appellate court and had these to say;

"Where there is no allegation of marriage section 160 of the Law of Marriage cannot be invoked merely on account

of concubinage association, Rule 93 of the GN. 179 of 196 is applicable in the division of property acquired during concubinage association”.

I have further considered, the defendant’s closing submission that she had been staying in the suit premises since 1998 or 2000 to 2019, thus making her dwelling therein for more than 12 years. The period spent in residing and dwelling by the defendant, in my firm view, does lead to the cause of action by the plaintiffs against the defendant to be barred by law of limitation since the plaintiffs have just stated to have invited her, thus the plaintiffs and defendant are hosts and invitee respectively if established so, which is not the case here, as the time does not run in favour of the invitee in other words the doctrine of adverse possession does not arise against the one who hosted the trespasser, defendant. My holding is fortified by the decision of the Court of Appeal in the case of **Musa Hassani v. Barnabas Yohanna Shedafa & Another** Civil Appeal No. 101 of 2018 (unreported) where it was held at page 5 that;

“As far as we are aware no invitee can exclude his host whatever the length of time the invitation takes place and whatever the unexhausted improvements made to the land on which he was invited”

Guided by the above case law, the defendant’s respectful argument in thus found baseless.

More so, the 1st plaintiff and defendant as earlier explained were concubines despite the fact the 1st plaintiff falsely attempted to hide this fact when he was cross examined by the defence counsel as shown herein under;

"For a long period, I know the defendant, I have helped her on various aspect including accommodation, more so I have been a friend to the defendant, ordinary friendship but the same ended when she started a desire to deprive me my properties.

Judiciously examining the 1st plaintiff's response when cross examined by the defence, it is clear that he was trying to repudiate their concubinage however when I carefully look at the documentary evidence tendered by him namely; Defendant's Application Form No.5 (PE24), it envisages that, the defendant and the 1st plaintiff had love affairs since 1990s and that it was the 1st plaintiff who assisted her to build the house. Equally, when I diligently look at the decision of the ward tribunal which he personally tendered for evidential value (PE10), it is certainly clear that the 1st plaintiff admitted to have been in a concubinage relationship with the defendant. Hence the 1st plaintiff's attempt to tell untruth in court reduces credibility of his evidence. For the sake of clarity, I reproduce part

of exhibit P10

"PE10: Mdaiwa alikiri kuwa alikuwa na mahusiano na Mdai. Akihojiwa namdai aliulizwa, Tulifahamiana Mwaka gani. Akajibu, mwaka 1997".

Basing on the above exhibits whose parts of their contents are quoted above, I am convinced that the denial of existence of concubinage relationship between the 1st plaintiff and defendant since 1990s to 2016 is an afterthought pertaining with ill motive.

On the **Second issue**, what reliefs parties are entitled to. This court holds that, on balance of probability, the plaintiffs have failed to prove their case if they lawfully and jointly own the suit premises. Nevertheless, as to the 1st plaintiff, his involvement in the developments of the suit land have been sufficiently proven. He is thus entitled to the suit premise as the case to the defendant since they are found to have been partners in either acquisition plots and their developments.

However, I cannot be justified in law to proceed determining the issue of division of the property that were acquired during concubinage between the 1st plaintiff and defendant. I am of that view merely because this court have not been moved or asked to do so be it through the plaint or the defendant's written statement of defence which ought to be




accompanied by a counter claim praying to that effect. Worse still, this court (Land Division) is not a proper forum for the Division of the property upon termination of their concubinage.


In the upshot, I herein under make the following orders;

- (i) The Plaintiffs' suit partly succeeds and it is partly dismissed
- (ii) The 1st plaintiff and defendant have legal rights of the suit premises
- (iii) The 1st plaintiff and defendant are entitled to division of properties after the termination of their concubinage association before a civil court forum
- (iv) The certificates of titles on Plot No. P20088, Plan No. DSM0020918 and Plot No. P20086, Plan No: DSM0020918 are hereby cancelled, the Land Commissioner is directed to revoke them accordingly.
- (v) Given the nature and relationship that existed before the termination of concubinage, I refrain from ordering costs of this suit.



Court: Right of appeal is fully explained


M. R. GWAE
JUDGE
26/07/2022


M. R. GWAE
JUDGE
26/07/2022