

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

**LAND CASE NO. 124 OF 2021**

**RUWAICHI JOHN MOSHA.....PLAINTIFF**

**VERSUS**

**DICKSON KASHURA.....DEFENDANT**

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**JUDGMENT**

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Date of Final Submissions: 14/06/2022

Date of Delivery: 22/07/2022

**AMOUR S. KHAMIS, J:**

Ruwaichi John Mosha was the highest bidder in a public auction conducted by Comrade Auction Mart and Court Brokers Company Limited on 22 June 2013 in respect of a property on Plot No. 33, Tabata Industrial area, C. T No. 45667, Ilala City, Dar es Salaam.

The public auction was preceded by an advertisement for sale which featured in Uhuru Newspaper dated 7<sup>th</sup> June 2013.

The advertisement was to the effect that Comrade Auction Mart and Court Brokers Limited would sale the property after 14

days from date of the publication in accordance to the instructions given by CRDB Bank Plc.

The publication described the property to be sold in terms of its plot number, location, number of certificate of title, land office number and revealed that a public auction was set to run on 22 June 2013.

Having offered Tshs. 190,000,000/=, Ruwaichi John Mosha emerged as the highest bidder and thus a successful purchaser of the property.

The plaintiff was subsequently issued with a certificate of sale and pursuant to a power of sale dated 16 July 2018, he was duly registered as a lawful owner of the property.

Being a registered owner, sometimes in October 2018, Ruwaichi John Mosha verbally and in writings demanded Dickson Kashura to yield vacant possession of the property to no avail.

Confronted with resistance from Dickson Kashura, Ruwaichi John Mosha sought assistance from the Police but the eviction attempts did not yield positive results.

On account of the continued occupation of the property, Ruwaichi John Mosha instituted the present case against Dickson Ksshura for declaration that he is the lawful owner of the property, that Dickson Kashura, his servants, agents or otherwise are in wrongful occupation of the property, an order to vacate from the property, permanent injunction from interfering with his right to possession, general damages and costs of the suit.

According to the Plaintiff, Ruwaichi John Mosha has been deprived of the use and enjoyment of the suit property, its development plans have been frustrated and thus suffered loss and damages.

In a Written Statement of Defence presented on 16 September 2021, Dickson Kashura generally disputed Ruwaichi John Mosha's allegations and subjected him to strictest proof thereof.

He specifically averred that the Plaintiff's claim is misconceived as the disputed property was lawfully owned by Hydro – X Industrial Services Limited, a company that was in actual possession thereof.

Dickson Kashura added that Ruwaichi John Mosha was not entitled to any of the reliefs sought allegedly because he had no iota of right over the property.

According to the Written Statement of Defence, an advertisement for a public auction was fraudulently and malafidely made by CRDB Bank Plc.

Further Dickson Kashura alleged that a public auction was fraudulently conducted by CRDB Bank Plc and its allies and that the fraud was reported by Hydro – X Industrial Services Limited to the Prevention and Combating of Corruption Bureau (PCCB) and that the issue was under investigation.

It was alleged that on 29 November 2018 PCCB wrote a letter to the Registrar of Titles to desist from proceeding with transfer of the property pending investigations.

It was further alleged in the Written Statement of Defence that a certificate of sale, transfer under power of sale and certificate of title (documents) annexed to the Plaintiff were wanting as did not disclose the plaintiff's ownership.

In a Reply to the Written Statement of Defence, Ruwaichi John Mosha asserted that that transfer of the disputed property to him was formally effected by relevant authorities on 16 July 2018.

As regards to fraud, he averred that the same was allegedly committed by CRDB Bank PLC but no particulars were given.

On PCCB investigation, Ruwaichi John Mosha asserted that according to annexure DK – 3 to the Written Statement of Defence, PCCB investigated an allegation for fraud related mortgage and not on sale of the disputed property by public auction.

The plaintiff further averred that a fraud on mortgage was earlier on raised by Dickson Kashura in Civil Case No. 194 of 1999 which was decided in favour of CRDB Bank Plc.

In a further reply, Ruwaichi John Mosha stated that copy of a certificate of title attached to the Plaintiff clearly showed he was the registered owner of the disputed property.

Further, Ruwaichi John Mosha asserted that as a lawful owner, he was entitled to claim vacant possession of the disputed property.

Upon completion of the pleadings, the matter was filtered through the statutory requirements, namely: first pre – trial conference, mediation and second or final pre - trial conference.

Three issues went into record for determination:

1. Whether the plaintiff is lawful owner of the disputed property.
2. If the first issue is answered in the affirmative, whether the plaintiff is entitled to vacant possession.
3. To what reliefs are the parties entitled to.

This matter was initially handled by my sister, Hon. Arafa Msafiri, J before it was re – assigned to me as part of a clean - up session. Order XVIII Rule 10 (1) of ***THE CIVIL PROCEDURE CODE, CAP 33, R.E 2019*** was accordingly observed.

Throughout trial, Mr. Charles Rwechungura, senior counsel, acted for the defendant, Dickson Kashura. Mr. Rajab Mrindoko, learned advocate of this Court, appeared for the plaintiff, Ruwaichi John Mosha.

A total of two (2) witnesses testified for the plaintiff and one witness for the defendant. The plaintiff's witnesses were Ruwaichi John Mosha (PW 1) and Issa Msala Bendera (PW 2). Dickson Simon Kashura (DW 1) was a sole witness for the defendant.

Ten (10) documentary exhibits were admitted for the plaintiff and four (4) exhibits for the defendant.

Following closure of the defendant's case, on 7 June 2022 this Court ordered parties to file final written submissions. The order was duly complied with by the plaintiff's counsel but no submissions were received from the defendant.

I am therefore constrained to refer to the one sided arguments in addressing the issues on record. However, I will carefully examine the entire evidence on record in arriving at the final decision on the case.

The first issue is whether the plaintiff is the lawful owner of the disputed property.

On this issue, Mr. Rajab Mrindoko called attention to the evidence on record and asserted that the plaintiff established his claim on ownership.

He referred this Court to the case of ***AMINA MAULID AMBALI, ROSE KASHINDE and MASAKI KASHINDE V RAMADHANI JUMA, CIVIL APPEAL NO. 35 OF 2019*** (unreported) wherein a certificate of title was earmarked as conclusive evidence on ownership unless there was fraud.

PW 1 Ruwaichi John Mosha, told this Court that on a transfer done on 16 August 2018 by the Commissioner for Lands, he became a registered owner of the property.

He said the disputed property was bought by him in a public auction conducted on 22 June 2013 by Comrade Auction Mart and Court Brokers Limited.

On examination by Mr. Mrindoko, PW 1 said he was a highest bidder at Tshs. 190,000,000/=.

On further examination, the witness said the public auction was conducted pursuant to instructions given by the CRDB Bank Plc.

Examined as to how he became aware of the public auction, PW 1 said:

*"I knew about the auction through the loudspeakers of the Comrade Auction Mart who were advertising about the auction. Also, the stickers were placed on the walls of the buildings. Also there was advertisement in a newspaper Uhuru dated 07/6/2013...."*

On cross examination by Mr. Charles Rwechungura, PW 1 said the previous owner of the property was Hydrox Industrial Services Limited who defaulted to repay a loan with CRDB Bank Plc.

PW 2 Issa Msala Bendera, Operations Manager with Comrade Auction Mart and Court Brokers Limited, said on 16 May 2013 CRDB Bank PLC instructed his company to sale the disputed property by public auction.

Pursuant to the instructions, his company placed two adverts in Uhuru and Daily News of 7 June 2013 inviting the public for an auction on 22 June 2013.

The witness said upon expiry of 14 days, the auctioneer did not receive any objection or injunction and therefore the public auction was conducted on 22 June 2013.

On examination by Mr. Rajab Mrindoko, Issa Msala Bendera said several bidders showed up but the plaintiff gave the highest offer of Tshs. 190,000,000/=.

Subsequently, CRDB Bank PLC accepted the plaintiff as a lawful purchaser and he paid full purchase price.

On further examination, PW 2 said:

*"The bank (CRDB) handed to the purchaser an original certificate of title that enabled Ruwaichi Mosha to process transfer of right of occupancy with the Registrar of Titles.*

*Ruwaichi Mosha carried a transfer of the right of occupancy which finally was completed despite of intervention by PCCB....."*

The learned counsel for the defendant did not have any question to cross examine PW 2.

DW 1 Dickson Simon Kashura, a resident of Goba area, Dar es Salaam, shareholder and director in Hydrox Industrial Services Limited, told this Court that original owner of the property was Hydrox Industrial Services Ltd and wondered as to how Ruwaichi John Mosha became the owner.



On further examination, DW 1 said his company was involved in a case with CRDB Bank Plc in respect of certificate of title no. 45667 which ended in the hands of CRDB Bank under "*dubious circumstances*".

However, on further questioning by Mr. Rwechungura, DW 1 explained as to how change of ownership took place, thus:

*"I am however aware that in September 2013 we received a letter from Registrar of Titles that was addressed to RITA (Administrator General).*

*.....I found the letter under the door of my office. When I opened the letter, I saw it written by the registrar of Titles addressed to the Administrator General and copied to Ruwaichi John Masha.*

*In the said letter, the registrar of titles informed the Administrator General that he intended to change ownership from Hydrox Industrial services Ltd. The letter did not state name of the transferee....."*

On cross examination by Mr. Mrindoko, DW 1 admitted that exhibit P 1 (certificate of title no. 45667) showed that the property was previously mortgaged with CRDB (1996) Limited and the mortgage lapsed.

He disclosed that a certificate of title (Exhibit P 1) revealed that a transfer under power of sale was carried together with a transmission by operation of the law.

On further cross examination, DW 1 admitted that the certificate of title was changed on 16 July 2018 to register the plaintiff's name.

Responding to Mr. Rajab Mrindoko's questions, DW 1 said:

*"Consideration shown for the transfer is Tshs. 190,000,000/=. Between 1996 April I realized that the certificate of title was in the hands of CRDB allegedly for the purpose of loan. CRDB claimed that the company placed the certificate of title as a mortgage..."*

In return to questions regarding steps taken against CRDB Bank by his company, DW 1 said Hydrox Industrial Services Limited and he, jointly sued CRDB Bank, Angelo Pastory Mutta and Oldonyo Lengai Auction Mart in the High Court (Dar es Salaam District Registry) Civil Case No. 194 of 1999.

On outcomes of the case, DW 1 said:

*"The Court decided that the company had taken a loan. The bank was authorized to sale the disputed land. The said judgment was given in 2011.*

*We filed a notice of appeal against the judgment but the Court file disappeared."*

I have examined all relevant exhibits on record. Exhibit P 1, a certificate of title no. 45667 show the original owner was Hydrox Industrial Services Limited of P. o. Box 4857, Dar es Salaam.

The certificate of title show the property in dispute was used as a security with CRDB Bank (1996) limited to secure unspecified

sums of money. The mortgage was registered on 4 November 1997 under FD No. 19864.

Due to change of names, transmission by operation of law was registered on 16 July 2018 indicating that CRDB (1996) Ltd changed name to CRDB Bank PLC.

On 16 July 2018, Ruwaichi John Masha was registered as owner following a successful transfer under power of sale.

These particulars were corroborated by Exhibit P 2 - a certificate of sale in favour of the plaintiff dated 24 June 2013 and transfer under power of sale from CRDB Bank PLC to Ruwaichi John Masha dated 15 July 2013 witnessed by Advocate Felix Shayo Mbuya.

There is also Exhibit P 7, Auction Report prepared by Comrade Auction Mart Company Limited (Court Brokers) addressed to the Branch Director, CRDB Bank PLC, Lumumba Branch, Dar es Salaam.

The report dated 24 June 2013 with reference number CAM/CRDB/LUM/AUCT/13 partly reads:

*"We are glad to inform you that we observed all your instructions and managed to conduct the auction on the 22<sup>nd</sup> 2013 and the successful bidder was Mr. Ruwaichi John Masha of P.O. Box 40388 Dar es Salaam who offered Tshs. 190,000,000/= and he paid 25% of the auction proceeds Tshs. 47,500,000/= on the same day of auction.."*

Exhibit P 3 is Uhuru Newspaper dated 7 June 2013 showing an advert for a public auction in respect of the disputed property in Kiswahili language at page 20.

Exhibit P 6 is Daily News Paper of Friday, 7 June 2013 which at page 20, show the same notice to the public in English language.

Both Exhibits P 3 and P 6 indicates that the public auction was set to be conducted on 22 June 2013.

Exhibit P 5 is a letter from CRDB Bank PLC to the Managing Director of Comrade Auction Mart Company Limited dated 16 May 2013.

The letter with reference number CRDB/LUM/AUC/13 was titled: *"Instruction Letter to Auction Landed Property on Plot No. 33, Tabata Industrial Area with CT No. 45667, L.O No. 162619, INO Hydrox Industrial Services Limited"*.

The above named exhibits show a chain of events that started with mortgage of the right of occupancy by Hydrox Industrial Services Limited in favour of CRDB (1996) Limited on 4 November 1997, change of name from CRDB (1996) Limited to CRDB Bank PLC, CRDB instructions to Comrade Auction Mart Company Limited to auction the property following Hydrox Industrial Services Limited default in repayment of a loan, written notices for sale of the property by a public auction placed in Kiswahili and English newspapers, report on how the public

auction was conducted, issuance of a certificate of sale and transfer under power of sale in favour of the plaintiff.

Further the documents conclusively indicated that effective 16 June 2018, Ruwaichi John Mosha was registered as owner of the disputed property.

In the Written Statement of Defence, Dickson Kashura contended that sale of the disputed property to the plaintiff was fraudulently done by CRDB Bank PLC and its allies.

Nonetheless, no particulars of fraud were given out as required by Order VI Rule 4 of ***THE CIVIL PROCEDURE CODE, CAP 33, R.E 2019*** which provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, such particulars (with dates and items if necessary) must be shown in the pleadings.

In ***ABDULRAHMAN V FREDRICH DETLEF AND ANOTHER, CIVIL APPEAL NO. 112 of 1992*** (unreported) the Court of Appeal of Kenya observed that the burden of proving fraud is very heavy.

That position was heightened in ***MUTSONGA V NYATI (1984) KLR 425*** in which it was held that allegations of fraud must be strictly proved and a high degree of probability is required.

Explaining on such degree of proof, the Court observed that the standard of proof may not be as heavy as to require proof

beyond reasonable doubts but a degree which is more than just a balance of probabilities is required.

The purpose of pleadings is to give the adversary party a notice of the nature of the case that he has to meet during trial.

A litigant is bound to give full particulars which may be necessary to substantiate his allegations and particularly where fraud, misrepresentation, breach of trust, undue influence are alleged. Failure to do so, renders his/her case incredible.

In the present case, the defendant did not give particulars of fraud in the Written Statement of Defence. During trial, DW 1 Dickson Simon Kashura did not lead any evidence to prove such serious allegation against CRDB Bank PLC and its agents.

From the evidence on record, it was sufficiently proved that Civil Case No. 194 of 1999 between Hydrox Industrial Services Limited, Dickson Kashura V CRDB (1996) Ltd, Angelo Pastory Mutta and Oldonyo Lengai Auction Mart related to a dispute on mortgage between Hydrox Industrial Services Limited and CRDB Bank (1996) Limited.

It was equally proved that the issue of mortgage of a right of occupancy in respect of the disputed property was tackled by this Court in the said case and satisfied that the disputed mortgage was valid, this Court authorized sale of the disputed property to realize the outstanding loan.

In the circumstances, this Court holds as a fact, that the defendant failed to prove fraud against the plaintiff, CRDB Bank

PLC (which is not even a party to the case) and or any of “its allies”.

Section 40 of **THE LAND REGISTRATION ACT, CAP 334 R.E 2019** provides that a certificate of title shall be admissible in evidence of the several matters therein contained.

In the case of **AMINA MAULID AMBALI, ROSE KASHINDE and MASAKI KASHINDE V RAMADHANI JUMA, CIVIL APPEAL NO. 35 OF 2019** (unreported) at pages 6 – 7 of the typed Judgment, 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 unless it is proved that the certificate was not lawfully obtained...."*

The above holding is in line with a similar conclusion in the case of **SUN PALM LTD AND OTHERS V PIERRE LAPORTE LTD, CIVIL APPLICATION NO. 242 OF 1997** (unreported) wherein the Court of Appeal of Kenya persuasively held that:

*"A certificate issued by the Commissioner of Lands give all the proprietors the right to deal with their respective parcels of land and this right should not be lightly interfered with...."*

On soundness of the above position of the law and the evidence on record as succinctly depicted herein before, I am fully

satisfied that the first issue is answered affirmatively, that is; the plaintiff is the lawful owner of the disputed property.

Having answered the first issue in the affirmative, the second issue is whether the plaintiff is entitled to vacant possession.

The plaintiff's written submissions were silent on this issue.

It is however trite law that a registered owner of a parcel of land is entitled to enjoyment of all proprietary rights that come along with being a registered owner of that parcel of land.

It is equally trite law that until proved otherwise, possession in law follows the right to possess.

The defendant contended that the disputed property is owned by Hydrox Industrial Services Limited and that the plaintiff is not entitled to possession thereof, among other reliefs.

In the course of determining the first issue, I discerned that Hydrox's ownership of the property was frustrated by its failure to repay loan to CRDB Bank PLC and that the plaintiff lawfully acquired ownership of the disputed property.

The defendant banked on his report to PCCB and the "*ongoing*" investigation, to claim that the relevant authorities, namely; the Commissioner for Lands and the Registrar of Titles, did not have mandate to effect transfer of the right of occupancy.

In my view, the defendant's report to PCCB did not affect in any way, the procedure applicable for transfer of the right of occupancy in favour of the plaintiff.



According to Exhibit D 3, a letter by the Prevention and Combating of Corruption Bureau referenced PCCB/HQ/RB/73/2013 and dated 29 November 2018, PCCB investigated allegations relating to loan given by CRDB Bank PLC to Hydrox Industrial Services Ltd and Frederick Alexis Mwelinde Mutafurwa.

The investigation had nothing to do with a public auction and subsequent transfer of the property to the plaintiff as shown in the letter which partly reads:

*"Ofisi yetu inaendelea na uchunguzi dhidi ya mkopo wa Shilingi milioni 290 uliotolewa na benki ya CRDB kwa ndugu Angelo Pastory Muta kwa kipindi cha Oktoba 1997. Mkopo huo unaodaiwa kudhaminiwa na kampuni ya Hydrox Industrial Services Ltd na Bw. Frederick Alexis Mwelinde Mutafurwa."*

Having considered the defendant's averments and DW 1's evidence in extensor, I am of the view that the defendant's case did not raise any triable issue known in law and therefore his defence was frivolous, vexatious and calculated to delay determination of the case.

Therefore, being a registered owner, I find that the plaintiff is entitled to possession of the disputed property.

The last issue is what reliefs are parties entitled to? The Plaintiff show that the plaintiff prayed for declaratory orders that he is the lawful owner of the disputed property and that the defendant, his agents or servants are trespassers.

Further, the plaintiff sought for a permanent injunction to restrain the defendant, his servants or agents and whosoever related to him, to interfere him from possession of the suit property.

Lastly, he sought for general damages and costs of the suit.

Whereas it was established that the plaintiff is entitled to possession of the property, the issue is whether the reliefs sought can be ordered against the defendant.

The written submissions by the plaintiff's counsel on this issue were brief and unserviceable. Mr. Mrindoko submitted that the plaintiff proved the case on standard required in civil cases and prayed for reliefs sought in the Plaint.

Order 1 Rule 3 of ***THE CIVIL PROCEDURE CODE*** (supra) provides that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise.

The evidence on record as given by PW 1, PW 2, DW 1 and the entire documentary evidence established that prior to a public auction and transfer of the property to the plaintiff, Exhibit P 1 – a certificate of title, was registered in the name of Hydrox Industrial Services Limited.

It was equally established that the defendant is a director and shareholder of Hydrox Industrial Services Limited.

According to PW 1 on cross examination, there is a godown in the disputed property. The witness said the defendant was sued because he was the one found at the disputed plot.

On examination in chief, PW 2 Issa Msala Bendera said Dickson Kashura was the occupant of the plot. Mr. Rwechungura's non - questioning of the witness on this issue was a silent admission of the fact.

That notwithstanding, on examination in chief, DW 1 Dickson Simon Kashura, said:

*"Currently, the disputed property is in the hands of the company Hydrox Industrial Services Ltd. The company has placed its employees and security guards at the said property in order to take care of its properties..."*

*"Surprisingly, I was sued in my personal capacity in this case whereas I am a mere director in that company of Hydrox Industrial Services Ltd...."*

There was no contrary evidence to dispute that the defendant was a director and shareholder of Hydrox Industrial Services Limited.

In fact, Exhibits D 3, D 4 and D 2, letters from PCCB were either addressed and or copied to the defendant in his capacity as Managing Director of Hydrox Industrial Services Limited.

I therefore hold that indeed the defendant is both a director and shareholder of Hydrox Industrial Services Limited.

In ***MUSA MUSANGO V ERIA MUSIGIRE AND OTHERS (1966) EA 390***, it was held that to redress a wrong done to or to recover money owed to a company, action should be prima facie brought by the company and a suit by a shareholder should not be maintained except in cases of fraud or in cases where the action is ultra vires or in cases of individual injury to himself.

The Court further held that in cases of complaints affecting the company, the company should be joined as a party.

I need not repeat the law here, that on incorporation, a limited liability company's identity is distinguished from that of its members or subscribers.

In my view, the plaintiff ought to have sued the defendant and the company, Hydrox Industrial Services Limited because both were proved to be at the disputed plot.

That being the case, I declare the plaintiff as the lawful owner of the disputed property, Plot No. 33, Tabata Industrial area, Ilala, Dar es Salaam and that the defendant is a trespasser.

The defendant is hereby ordered to immediately vacate from the disputed property. For failure to join the company, I will not make any order for damages and or costs of the suit. It is so ordered.



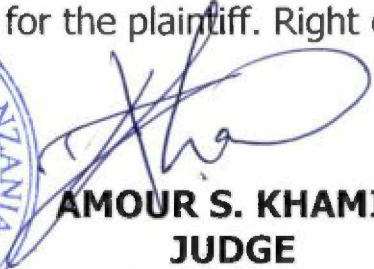
**AMOUR S. KHAMIS**  
**JUDGE**

**22/07/2022**

## ORDER

Judgment delivered in chambers in presence of Mr. Charles Rwechungura, Advocate for the defendant and Mr. Rajab Mrindoko Advocate for the plaintiff. Right of Appeal explained.



  
**AMOUR S. KHAMIS**  
**JUDGE**  
**22/07/2022**