

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO.62 OF 2019**

**M/S RIZIKI LULIDA.....PLAINTIFF**

***VERSUS***

**THE IMPERIAL ROAD HAULAGE LIMITED .....1<sup>ST</sup> DEFENDANT**

**MUBELWA JAMES MUTABILWA (As Administrator of the Estate of the late  
Ferdinand Mutagwaba Mutabilwa).....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

*29/12/2022 & 23/01/2023*

**L.HEMED, J.**

On the 15<sup>th</sup> day of December, 2021, the Plaintiff herein presented her amended Plaintiff under Order XXXV of the Civil Procedure Code, Cap 33 R.E 2019 against the 1<sup>st</sup> and 2<sup>nd</sup> defendants claiming for:-

*a). Vacant possession of house No.9 Kurasini Area, Temeke Dar  
es Salaam;*

- b). Permanent injunction against the defendants from interfering or trespassing the disputed land;*
- c). payment of Tshs 4,000,000/= as mesne profit for the period the 1<sup>st</sup> defendant has occupied the suit premises; and*
- d). Payment of general damages and costs of the suit.*

It was alleged that, house No.9 Kurasini Area, Temeke Dar es Salaam (the suit property) was attached by an order of the Kisutu Resident Magistrates' Court dated 13/01/2006 in execution of the Court Decree in Civil Case No.132 of 1996 between **Khamis Mohamed Azzan vs Salum Mohamed Mohsin**. The Plaintiff stated that on 30/01/2006 the Court issued a proclamation for sale of the suit property and eventually the said property was sold to the plaintiff by public auction conducted by Nsombo Auction Mart. After completion of sale of the suit landed property, the Court issued an order for eviction by demolishing against those who were residing in the disputed property. Execution was carried out and the property was handed over to the plaintiff on 11<sup>th</sup> day of May 2006.

The plaintiff alleged further that the 1<sup>st</sup> defendant, without any colour of right, has taken part of the suit premises utilizing the same as parking area for lorries and office without his knowledge and consent. It was

claimed by him that the 1<sup>st</sup> defendant is in occupation of the suit landed property for two years by now.

After the leave of the Court to defend the suit, the defendants filed their written statement of defence denying all the plaintiff's claims. The 1<sup>st</sup> defendants stated that the suit premise was leased to them by one MUCHUNGUZI MUTABIRWA as the disputed property formed part of the estate of the late MUCHUNGUZI MUTABIRWA/FERDINAND MUTAGWABA MUTABILWA.

The 2<sup>nd</sup> defendant disputed the claims and proceeded further to raise a counter claim against the plaintiff and the 1<sup>st</sup> defendant. According to the counter claim, the suit property is described as Plot No.9, Kurasini Area, L.O 47239, LD/59062 under the Certificate of Occupancy, Title No.186100/82 and the same was primarily registered in the name of Ferdinand Mutagwaba Mutabiilwa, (deceased), but now has been registered in the 2<sup>nd</sup> defendant's name as legal personal representative of the deceased. It was pleaded in the counter claim further that the judgment debtor in Civil Case No.132 of 1996 has never owned Plot No.9 Kurasini Area, L.O 47239, LD/59062, CT No.186100/82.

In replying to the counter claim, the 1<sup>st</sup> defendants maintained that one ABELA GLORIA MUTABIILWA, a blood sister of the counter claimant, leased the suit premises to them. The plaintiff stated to have purchased the suit property through public auction sanctioned by the Resident Magistrates' Court of Dar es Salaam at Kisutu in Civil Case No.132 of 1996.

At the commencement of the trial, this Court framed and recorded the following issues for determination: -

- 1. Who between the Plaintiff and 2<sup>nd</sup> defendant is the lawful owner of Plot No.9 Kurasini Area with Certificate of Occupancy Title No.186100/82.*
- 2. Whether the 1<sup>st</sup> defendant in the plaint who is also the 2<sup>nd</sup> defendant in the counter claim lawfully occupied the suit premises.*
- 3. Whether the 2<sup>nd</sup> defendant in the plaint who is also counter claimant in counter claim suffered any damage.*
- 4. To what reliefs are the parties entitled.*

To prove their cases, parties paraded their witnesses as follows: the plaintiff called three (3) witnesses who are Riziki Said Lulida (PW1),

Seleman Nassoro (PW2) and Khamis Mohamed Azan (PW3). The plaintiff tendered four documents as exhibits. The said documents are certificate of sale (exhibit P1), proclamation of sale (exhibit P2), decree in Civil Case No.132/1996 (exhibit P3) and application in Civil Case No.132/1996 filed by Abela Glory and Amy Mlay (exhibit P4).

The 1<sup>st</sup> defendant had one witness namely Solomon Wilson Mahogo (DW1). The 1<sup>st</sup> defendant managed to tender into evidence only one document, a letter dated 13/02/2007(exhibit D1). On his part the 2<sup>nd</sup> defendant paraded two (2) witnesses who are Waziri Masoud Mganga (DW2) and Mubelwa James Mutabilwa (DW3). The documents tendered by the 2<sup>nd</sup> defendant are Certificate of Occupancy, Title No.186100/82 (exhibit D2) and order of the Court striking out Civil Case No.132 of 1996(exhibit D3).

To start with the 1<sup>st</sup> issue which is on **ownership of the suit landed property namely Plot No.9 Kurasini Area with Certificate of Occupancy, Title No.186100/82 between the plaintiff and the 2<sup>nd</sup> defendant**. In respect to the question of ownership of the suit piece of

land between the Plaintiff and the 2<sup>nd</sup> defendant I will be guided by section 110(1) of the Evidence Act, [Cap 6 R.E 2019] which provides thus-

*"... Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

It was the testimony of PW1, PW2 and PW3 that the Plaintiff (PW1) purchased the property with Certificate of Title No.186100/42 situated at Kurasini Area Tom Estate, the property of one Mohamed Mohsin, through a public auction conducted by Nsombo Auction Mart, the Court Broker in 2006. The testimony of PW2 and the Proclamation of Sale (exhibit P2) mentions property House No.14(a)(b) 9.67/S Kurasini Area as the one which was identified and ordered by the Court to be auctioned. According to the testimony of PW3, initially, one Mohamed Mohsin borrowed from him a sum of Tshs. 5,000,000/= (Five Million Shillings Only) in 1995 and pledged Plot No.9 Kurasini Area with Certificate of Occupancy *vide* Title No. 186100/40 as security for the said loan. PW3 stated that, the said Mohamed Mohsin showed him the said property. He lodged Civil Case No. 132 of 1996 in the Resident Magistrates' Court of Dar es Salaam at Kisutu against

Mohamed Mohsin who admitted in Court that he was indebted to PW3 hence Judgment and Decree in favour of PW3.

PW2, officer from Nsombo Auction Mart, described the property he was ordered to sale as Plot No.9 Tom Estates, House No.14(a)(b)9.67/s.

PW1 and PW3 when cross examined, they testified that, what was attached and sold by the Court was Plot No.9 Kurasini Area under Title Deed No.18 registered in the in the names of HASSAN BIN MOHAMED MOHSIN and SALIM MOHAMED MOHSIN.

Testifying for the 2<sup>nd</sup> defendant's case, DW2, an officer from the office of the Registrar of Titles testified that Plot No.9 Kurasini Area Dar es Salaam under Certificate of Titles No.186100/82 is quite different from plot No.9 Kurasini Area under certificate of Title No.186100/40. DW2 informed the Court that the 1<sup>st</sup> registered owner of Plot No.9 Kurasini Area, Dar es Salaam under CT No.186100/82 was Ferdinand Mutagwaba Mutabilwa who was first registered as owner on 18/01/1980. DW2 testified further that currently, the suit property is registered in the name of DW3 as legal personal representative of Ferdinand Mutagwaba Mutabilwa, deceased.

Proof of ownership of registered land as per section 29 of the Land Act, [Cap 113 R.E 2019], is through the Certificate of Occupancy. In other

words, the person who holds a certificate of occupancy in respect of a particular piece of land, is the recognized occupier. Additionally, section 35 of the Land Registration Act, [Cap.334 R.E 2019] insists that the owner of land is entitled to receive a certificate of title. It provides thus: -

*"35. The owner of an estate in any parcel shall be entitled to receive a certificate of title under the seal of the certificate land registry in respect thereof, showing the subsisting memorials in the land register relating thereto and co-owners may, if they so desire, receive separate certificates of title in respect of their respective shares..."* (Emphasis supplied)

It should be noted that, registration under a land titles system is more than the mere entry in a public register; it is authentication of the ownership of a legal interest in a parcel of land. The act of registration confirms transaction that confer, affect or terminate that ownership or interest. In **Amina Maulizo Ambali & 2 others vs Ramadhani Juma**, Civil Appeal No.35 of 2019, the Court of Appeal of Tanzania had this to say at pg.6 that:-

*"In our considered view, when two persons have competing interest 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."*

In the present case, it has been unequivocally established that the suit piece of land known as Plot No.9 Kurasini Area with Certificate of Title No.186100/82 was formerly allocated to the late Ferdinand Mutagwaba Mutabiilwa. Following his demise, DW3, the 2<sup>nd</sup> defendant was registered on the 11<sup>th</sup> January 2016 as legal personal representative.

In *extenso*, I have gone through the evidence adduced in favour of the plaintiff's case only to find that the property which the plaintiff purchased was Plot No.14(a)(b)4.67/5 and not Plot No.9 Kurasini Area, C.T. No.186100/82 (the suit property). From the available evidence, it is obvious that the 2<sup>nd</sup> defendant has managed to prove that the suit property is under his care as the registered personal legal representative of the late Ferdinand Mutagwaba Mutabiilwa.

In **Hemedi Saidi v. Mohamedi Mbilu** [1984] T.L.R. No.113, it was stated thus: "*According to 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...*" In the matter at hand, the 2<sup>nd</sup> defendant's evidence is heavier

than that adduced by the plaintiff in respect of the question of ownership of the suit landed property. He is the one who must win.

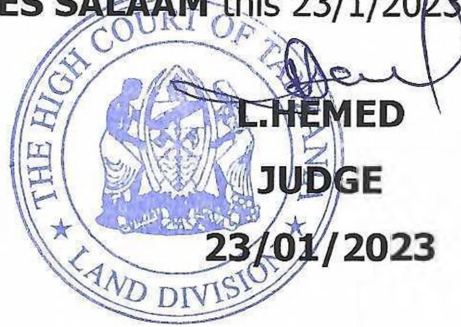
In regard to the 2<sup>nd</sup> issue, this Court is invited to determine as to whether the 1<sup>st</sup> Defendant in the Plaint who is also the 2<sup>nd</sup> Defendant in the counter claim lawfully occupied the suit premises. Evidence on record shows that the 1<sup>st</sup> defendants in the plaint who are also the 2<sup>nd</sup> defendants entered into occupation of the suit premises after having signed a lease agreement with one ABELA GLORIA MUTABILWA, the sister of the 2<sup>nd</sup> defendant and the counter-claimant. The 1<sup>st</sup> defendants trusted the said sister of the 2<sup>nd</sup> defendant after having produced introduction letter (exhibit D1). In his testimony, DW3 tried to denounce that he never instructed his sister to lease the property or sign lease agreement on his behalf. The fact that DW3 confirmed that Abela Gloria Mutabilwa is his sister, the 1<sup>st</sup> defendants had reasonable ground to believe that Abela had full instructions and mandate to lease the suit piece of land or sign lease agreement. Evidence has also revealed that the 1<sup>st</sup> defendants promptly payed rent to Abela believing that they were dealing with the right person. In the present matter, the 1<sup>st</sup> defendants were *bonafide* tenants in the suit premises. I have also noted that the counter claim against the 1<sup>st</sup>

defendants could not be proved without joining the necessary party, the person who leased the premises to Imperial Road Haulage Limited. From the foregoing, I am firm to hold that the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendants in the counter claim were the *bonafide* tenants in the suit premises.

The 3<sup>rd</sup> issue is on whether the 2<sup>nd</sup> defendant in the Plaint who is also the Counter Claimant suffered any damage. I have gone through the entire evidence adduced by all witnesses to find if the 2<sup>nd</sup> defendants managed to prove any damage. My keen perusal could not find any form of evidence to prove specific or general damages.

As to the question of reliefs the parties are entitled to, I am of the considered view that the plaintiff has failed to prove her claims on ownership of the suit land. I do proceed to dismiss the plaintiff's case and proceed to declare the 2<sup>nd</sup> defendant and the plaintiff in the Counter claim the lawful owner of **Plot No.9 Kurasini Area, Dar es Salaam under CT No.186100/82** as personal legal representative of the late **Ferdinand Mutagwaba Mutabiiilwa**. In the circumstance of this case, each party to bear its own costs. It is ordered.

**DATED at DAR ES SALAAM** this 23/1/2023



**COURT:** Judgment is delivered in the presence of Mr. Wilson Ogunde Adv for 2<sup>nd</sup> Defendant also holding brief of Mr. Abubakar Salum for the Plaintiff and Mr. Seleman Almasi for the 1<sup>st</sup> defendants.

Right of Appeal explained.

