

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.385 OF 2017

MARIA CHRYSTOM LWEKAMWA.....PLAINTIFF

VERSUS

PLACID RICHARD LWEKAMWA.....1ST DEFENDANT

LUCAS RICHARD KAMI.....2ND DEFENDANT

JUDGMENT

22/02/2023 & 28/02/2023

L.HEMED, J.

Initially, on 12th day of October, 2017, **Maria Chrystom Lwekamwa**, the plaintiff in this matter instituted the suit against **Placid Richard Lwekamwa, Lucas Richard Kami** and **the Commissioner for Lands** claiming for among others, to be declared owner of Plot No.2007 (318 A), Kawe Beach, Kinondoni Municipality (the suit property). However, in the course of determining the matter, the plaintiff opted to drop claims against the Commissioner for lands and retained claims against the present 1st and 2nd defendants.

The Plaintiff alleged that on 7th November 1976, her and her husband one Richard Kami Lwekamwa jointly brought a piece of land from James S. Salala. The Plaintiff alleged that the said piece of land was subsequently developed through construction of a house. The suit land was also surveyed as Plot No. 318, Kawe Beach and was registered on March 1987 and given a Title No.2782.

It was alleged further that the plaintiff and her late husband who passed away on 22nd July 2009 subdivided Plot No.318 into two plots for easier of development, hence the creation of Plot No.2007. The plaintiff claims that the registration of the suit property in the name of the 1st and 2nd defendant was fraudulently made because the suit property was not party of the estate of their deceased father one Richard Kami Lwekamwa. The Plaintiff prays for the following reliefs:

- 1. Declaratory order that that she is the lawful owner of the disputed property;*
- 2. For permanent injunction restraining the 1st and 2nd defendant from entering into the suit property.*

3. For an order against Commissioner for lands to rectify the land register by removing the name of the 1st and 2nd defendants and replace them with the name of the Plaintiff.

The defendants disputed all the claims of the Plaintiff by filing the joint written Statement of Defence. In their defence they also claimed to be the lawful owners of suit property on Plot No.2007, Kawe Beach. According to the defendants, they inherited the suit land from their deceased father. It was the defendants' contention that the suit be dismissed.

Two issues were framed for guidance in determining the matter at hand. These are: -

- 1. Who is the lawful owner of the landed property on Plot No.2007 (318A), Kawe Beach, Kinondoni Municipality.*
- 2. To what reliefs are the parties entitled.*

To prove her case, the plaintiff testified as PW1 and called Ally Mbegu Mintanga Kondo (PW2) and Waziri Mohamed Mkunyungu (PW3). Two documents were tendered and admitted into evidence for the plaintiff's case. The documents are Letter from Kinondoni Municipal Council dated

11/09/2013 (Exhibit "P1"), addressed to the Plaintiff showing the costs for the requested resurvey of Plot Number 318A Kawe. Another document which was admitted into evidence was a letter from the Registrar of Titles dated 27 /04/2017 (exhibit "P2") addressed to Placid Richard Lwekamwa notifying him that the Plaintiff had registered a caveat over the property with Certificate of Title No.142542.

The defendants' case had two witnesses. The 2nd defendant who testified as DW1 and called one Florence Richard Lwekamwa who gave testimony as DW2. The 2nd Defendant managed to tender eleven (11) documents to support his defence case. The documents were, the Certificate of Title No.142542 (exhibit D1), Inventory in Probate Cause No.3 of 2011 (exhibit D2); payment receipts and acknowledgment letter (exhibit D3); the letter dated 11/8/2014 with Reference No. KMC/LD/62037/ PMR on the subject matter "*KIWANJA NA 2007 ENEO LA KAWE ZAMANI KIKIJULIKANA KAMA KIWANJA 318 A KAWE BEACH*" (exhibit D4); the letter with Ref. No. LD/101076/63 dated 07/05/2015 on the subject matter "*KIWANJA NA.2007 KAWE BEACH –JIJINI DAR ES SALAAM*" (exhibit D5); the Judgment of the District Court of Bukoba in Civil Appeal No.2 of 2014 between STEPHEN N LWEKAMWA vs MARIA LWEKAMWA (exhibit D6); the Tenancy Agreement

between R.K.LWEKAMWA AND MINE DE COPPER (T) LTD signed on 1st day of November 2010 and that of 1st day November, 2011 are hereby collectively (exhibit D7); the *ex parte* Judgment and Decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No.105 of 2014 (exhibit D8); a copy of the Misc. Land Application No. 454 of 2017 and its Withdrawal Order on an application to set aside the *ex parte* judgment (exhibit D9); the letter dated 28th February, 1987 with Ref. No. LD/101076/7/BM (exhibit D10) and the exchequer receipts dated 01/06/2005, 05/09/2006 and 08/06/2009 are collectively (exhibit D11).

Let me start with the 1st issue as to who between the plaintiff and the defendants is the lawful owner of the suit property, Plot No.2007 (318A), Kawe Beach, Kinondoni Municipality.

In her evidence to establish her case, PW1 adduced that she bought the disputed land jointly with the deceased from the original owner named James Salala in 1976. The suit land, later came to be known as Plot No.318, Kawe Beach. She informed the Court that after the death of her husband, she applied to Kinondoni Municipal Council for subdivision of the

said Plot. It was also adduced that she told the administrator of the estate one Stephene Lwekamwa not to distribute the suit property to the 1st and 2nd defendants because the same did not form part of the estate of the deceased. She added that the administrator proceeded to distribute the suit property to the defendants and was later registered in their names. When Cross examined, PW1 conceded that the property in dispute originally formed part of Plot 318 Kawe Beach and was registered in the name of the deceased herein since 1982.

Evidence of PW2 was to the effect that James Salala was his grandfather and that in 1976 he saw the plaintiff and the deceased getting into his grandfather's house. PW2 was later apprised by his grandfather that he had sold the piece of land. PW2 was given a bicycle as a gift. When cross examined, PW2 told the Court that he never witnessed the sale transaction.

On his part, PW3 testified to have known the plaintiff and her husband way back in 1989. According to PW3 he was employed to paint the house in the suit landed property. He said that the suit house was used for renting and that the plaintiff started living in the premises in 2017 after

the death of her husband. When he was cross-examined, he stated that he did not know how the suit property was acquired.

Further, the 2nd defendant (DW1) testified that he and the 1st defendant are the registered owner of the property on Plot No. 2007, Kawe Beach. He tendered the Certificate of Title No.142542 issued by the Commissioner for Lands in 2014 (Exhibit D 1). He testified that they acquired the suit property through inheritance *vide* Probate Cause No. 3 of 2011. He tendered inventory and judgment of primary Court for Kolekero (Exhibit D2).

He testified further that after the property had been given to them, they went to take possession and find out the plaintiff having evicted tenants and started living therein by herself. He told the Court that they decided to institute a suit at the District Land and Housing Tribunal for Kinondoni at Mwananyamala which was registered as Land Application No.105 of 2014 claiming for ownership of the suit land and for eviction of the plaintiff herein. The matter was heard *ex parte* and the defendants herein were declared lawfully owner of the suit landed property *vide* Judgment and Decree dated 18th February 2016 (exhibit D8).

DW1 also notified the Court that the Decree of the Tribunal was executed through Msolopa Investment, the Tribunal Broker by evicting the plaintiff herein (Judgment Debtor) and handed over the premises to the defendants' herein, (the decree holders). Having been evicted, the plaintiff filed Misc. Land Application No.454 of 2017 for extension of time to set aside *ex parte* judgment but withdrew it on 30th October 2017. He tendered the withdrawal order (exhibit D9). In her evidence, DW2 supported the testimony of DW1 where she stated that the defendants are the registered owners of the suit land which they inherited it from their deceased father.

Having carefully examined the evidence of both sides, it is appropriate to determine who between the parties has managed to prove his/her case. Section 110 of the Evidence Act, [Cap 6 R.E 2019] imposes a duty to persons who allege to prove. It provides thus: -

"110.-(1) 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.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

In the present case the parties were bound to prove their claims. The 1st issue to prove was as to "***who between the parties is the lawful owner of the property on Plot No.2007 (318A), Kawe Beach, Kinondoni Municipality.***" As aforesaid, the Plaintiff in her testimony alleged to have acquired the suit property jointly with her late husband through purchase in 1976 from one James Salala. However, the plaintiff could not produce any documentary evidence to substantiate the alleged sale transaction. The Plaintiff also called two witnesses to support her evidence. PW2 told the Court to be the grandson of James Salala, the person alleged to have sold the suit land to the plaintiff and her late husband. He narrated that sale the transaction to have taken place in the house of his grandfather. When cross-examined PW2 confessed that he did not witness the transaction. PW3 was the person who employed by the late Richard Kami Lwekamwa, the husband of the Plaintiff to paint the suit premises. PW3 told the Court that he did not know how the plaintiff and her husband acquired the suit premises.

On their part, the defendants through DW1 told the Court that they acquired the suit landed property by inheriting it from their late father. Having finalized the inheritance process the suit property was transmitted and registered in the names of the defendants and the certificate of title was issued to them (Exhibit D1).

According to section 29 of the Land Act, [Cap 113 R.E 2019], Proof of ownership in registered land is through Certificate of Occupancy. In other words, a person who is issued with the certificate of occupancy/ granted right of occupancy in respect of a particular piece of land, is the recognized occupier/ owner of the particular land. Additionally, section 35 of the Land Registration Act, [Cap.334 R.E 2019] insists that the owner of an estate/piece of land is entitled to receive a Certificate of Title. In other words, proof of ownership of the registered land is by way of the 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. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title. 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, only the defendants who managed to prove that that they are the registered owners of the suit piece of land through the

certificate of title No.142542 (exhibit D1). This unequivocally prove that the defendants have a good title on the suit landed property than the plaintiff.

Apart from the fact that the defendants have the certificate of title in respect of the suit landed property, they were declared owners by the judgment of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 105 of 2014 (D-8). The said decision of the DLHT has never been challenged. According to evidence on record, Msolopa Investment, the tribunal broker who evicted the plaintiff from the suit premises, carried out execution of the said decree. Since the decision of the DLHT for Kinondoni at Mwananyamala has never been challenged, this Court cannot vary it through this suit. If the Plaintiff was aggrieved by the said decision of the DLHT, ought to have challenged it to the superior Court. The fact that she decided to sleep over her right, she is considered to have accepted the said decision. In fact, the existence of the said decision renders the matter at hand invalid and abuse of Court process.

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 defendants' evidence is much heavier than that adduced by the plaintiff in respect of the question of ownership of the suit landed property. They are the ones who must win.

As to the second issue on to what reliefs are the parties entitled, 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 defendants owners of the suit landed property known as **Plot No.2007 Kawe Beach, Kinondoni Municipality**. The defendants are also entitled to costs of this suit.

DATED at DAR ES SALAAM this 28th February 2023.



L. HEMED,
JUDGE
28/02/2023

COURT: Judgment is delivered today, this 28 February 2023 in the presence of the Plaintiff appearing in person and Rahel Salumbo advocate holding brief of Mr. Rajab Mrindoko advocate for the defendants. Right of appeal explained.



L. HEMED,
JUDGE