

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

AT DAR ES SALAAM

LAND CASE NO. 191 OF 2022

VERONICA FAILOS MASSAWE PLAINTIFF

VERSUS

SAIMON PAULO NHUMBI 1ST DEFENDANT

SIKITU HASSAN 2ND DEFENDANT

SIMON EFREM 3RD DEFENDANT

MASOUD MSANGI 4TH DEFENDANT

HEAVEN ORIGENES MTUI 5TH DEFENDANT

JUDGMENT

Date of last Order: 05.05.2023

Date of Judgment: 11.05.2023

A.Z. MGEYEKWA, J

At the centre of controversy between VERONICA FAILOS MASSAWE, the Plaintiff against SAIMON PAULO NHUMBI, SIKITU HASSAN, SIMON JOHN, MASOUD MSANGI, and HEAVEN ORIGENES MTUI, the Defendants. The facts of the case can be deciphered from the pleadings

and evidence on record go thus: The Plaintiff secured a parcel of un surveyed land measuring two acres located at Tegeta 'A' Goba (hereinafter refers as a suit land) from Habibu Athuman Mpira way back in 2000. According to the pleadings, the Plaintiff alleges that she planted coconut trees and other seasonal plants such as cassava and commissioned the 1st Defendant, the former ten-cell leader to look after the suit land. The Plaintiff alleges that the 2nd and 3rd Defendant illegally appropriated the suit land and constructed permanent buildings thereon without the Plaintiff's permission.

The Plaintiff in his Complaint further stated that the 1st Defendant illegally sold a piece of the suit land to the 4th Defendant who subsequently constructed a permanent structure thereon. The Plaintiff claimed that the 1st Defendant has fabricated the story that the Plaintiff gave him the pieces of suit land as part of the payment for taking care of the said land. In the complaint, the Plaintiff stated that she has been ineffective and peaceful occupation of the suit land until 2016 or early 2017 when she realized that the 1st Defendant has sold substantial parts of the suit land to the 2nd, 3rd, and 4th Defendants and the 5th Defendant emerged from nowhere and started to claim ownership over a portion of the suit land a portion which is illegally occupied by the 2nd and 4th Defendants.

The Plaintiff filed a Plaint on 29th July 2022 claiming against the defendants jointly and or severally for the following reliefs: -

- (i) *A declaration that the Plaintiff is a rightful owner of a piece of un-surveyed land measuring two acres located at Tegeta 'A' Goba, Ubungo District.*
- (ii) *General damages.*
- (iii) *Costs of this suit.*
- (iv) *Any other reliefs which this Honourable Court may deem fit to grant.*

The case was conducted through Witness Statements. Whereas, in response to the Plaint, the Defendants filed a Written Statement of Defence disputing all the claims and put the Plaintiff in strict proof of his unfounded allegations.

At all the material time, the Plaintiff was represented by Mr. Pongolela David and Eunice Msami, learned Advocates while the 1st Defendant had the legal service of Mr. Adrian Mhina, the 2nd Defendant, 3rd and 5th Defendants enjoyed the legal service of Mr. Sabas Shayo, learned counsel and the 4th Defendant enlisted the legal service of Mr. Nazario Michael, learned Advocates.

During the Final Pre-Trial Conference, two issues were framed for determination as follows: -

- 1) *Who is the rightful owner of the disputed land.*
- 2) *To what relief are the parties entitled to.*

The Plaintiffs case was founded on Ms. Veronica Falios Massawe, who testified as **PW1**, and Gaudiosa Massawe (**PW2**). In a bid to establish their defence case, the Defendants testified in person; Saimon Paulo Nhumbi, the 1st Defendant (**DW1**), Sikitu Hassan, the 2nd Defendant (**DW2**). The 3rd Defendant was Simon Efrem (**DW3**), the 4th Defendant was Masoud Msangi (**DW4**) and the 5th Defendant was Heaven Origenes Mtui (**DW5**).

It is needful to mention that the following exhibits were adduced in support of the party's testimony. The Plaintiff's side tendered two documentary exhibits; a Witness Statement (Exh.P1) and Sale Agreement dated 29th January 2000 between Habibu Athumani and Veronica F Massawe (**Exh.P2**).

On his side, the Defendants tendered in total 8 documentary exhibits to wit, 1st to 5th Defendants' Witness Statements (Exh.D1), (Exh.D2), (Exh.4), (Exh.D6) and (Exh.D8) respectively. A sale Agreement between the 2nd Defendant and the 5th Defendant was admitted as (Exh.D3). A Sale

Agreement between the 3rd Defendant and 5th Defendant (Exh.D5), a Sale Agreement between the 5th Defendant and Athumani Mpeta (Exh.D7).

Following the Court order made on 17th February 2023, the Court invoked its power under Order XVII Rule 2 of the Civil Procedure Code Cap. 33 as amended by GN. 761 of 2021 and ordered the facts of this case be proved by Witness Statements. The Plaintiff was ordered to file their Witness Statements on 23rd February 2023, cross-examination and tendering of documents was scheduled on 28th February 2023. The Defendants were ordered to file their Witness Statements on 17th March 2023, and cross-examination and tendering of documents were scheduled on 21st March 2023.

It is noteworthy to point out that the parties had on 5th May 2023 agreed to make written final submissions for the purpose of assisting the Court to determine the matter in controversy. Cheerful the order was compiled and honored by all parties. I take this opportunity to thank them for their well-researched submissions, their submissions were considered in articulating this Judgment.

In the course of determining this case, I will be guided by the principle outlined in civil litigation and which will guide this Court in the course of determining this suit. Section 110 of the Evidence Act, Cap.6 [R.E. 2019] places the burden of proof on the party asserting that party desires a

Court to believe him and pronounce judgment in his favour. I am going to determine whether the Plaintiff was able to prove his claim on the balance of probabilities to warrant this Court to decide in his favour. My starting point would be to give an exposition of the law relating to pleadings. The plaintiff is duty-bound to prove his case. This is in accordance with section 110 of the Evidence Act, Cap.6, [R.E. 2019] which provides that:

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

Similarly, in the case of **Abdul Karim Haji v Raymond Nchimbi Alois & Another**, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal held that:-

“... it is an elementary principle that he who alleges is the one responsible to prove his allegations.”

Similarly, in the case of **Anthony M. Masanga v Penina (Mania Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (CAT) (unreported) where it was further held that:-

“The party with legal burden also bears the evidential burden on the balance of probabilities.”

In the case of **Abdul Karim Haji v Raymond Nchimbi Alois & Another**, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal held that:-

".... it is an elementary principle that he who alleges is the one responsible to prove his allegations."

In resolving the controversy before me, the above underlying principles, and case laws shall guide my evaluation and analysis of the evidence that was presented by parties in this suit, and with earlier framed issues by the court will be resolved seriatim: -

Starting with the first issue; *who is the lawful owner of the suit land*. The analyses of this issue show that the parties herein lock horns on who is the lawful owner of the suit property between the Plaintiff and the Defendants.

In a chronological account of the ownership of the property the Plaintiff's Witness Statement presented; PW1 bought the suit land measuring two acres in 2000 located at Tegeta 'A' Goba Ubungo District, Dar es Salaam from Habibu Athumani Mpeti. To substantiate her testimony, PW1 tendered a Sale of Agreement (Exh.P2) the same was witnessed by one Saimon Paulo Nhumbi ten cell leader.

PW1 testified to the effect that after noting that DW1 sold the suit land to the Defendant, hence she filed the instant suit against the Defendants.

PW1 further testified to the effect that she had a peaceful occupation until in 2016 when she realized that DW1 sold the substantial part of the suit land to other Defendants. PW1 evidence was supported by PW2 who testified to the effect that PW1 bought the suit land from Habibu Mpeta. PW2 said that she witnessed the sale, signed the Sale Agreement and DW1 prepared the Sale Agreement.

However, going through the Defendants' Witnesses' Statements and the witnesses' testimonies during cross-examination, it is clear that none of the Defendants testified that he or she bought a piece of the suit land from DW1. The 2nd and 3rd Defendant testified to the effect that they bought the suit land from Heaven Mtui (DW4) and DW4 testified to the effect that he bought the suit land from Athumani Mpeta. DW4 in his evidence denied the fact that DW1 sold him the suit land. As I have pointed out earlier, the burden of proof is upon the Plaintiff to prove that DW1 sold the suit land to the Defendants. To the contrary, there is no any proof that the Defendants bought the suit land from DW1.

Having gone through the testimonies of PW1 and DW1, it comes out clearly that their testimonies on which the Plaintiff's case hinges contains hearsay evidence. It is all hearsay as none of their evidence is supported by a documentary evidence. The laws as it currently obtains is that as a general rule, evidence can only be admissible if the same is direct and

whatever else that is not direct is hearsay and inadmissible. This is the import of section 62 (1) of the Evidence Act, Cap.6 [R.E 2019]. Hearsay evidence is an assertion of a person other than the witness testifying, offers as evidence of the truth of that assertion, rather than as evidence of the fact that the assertion was made. See the case of **Subraminiam v Public Prosecutor** [1956] W.L.R. 965.

Based on the above findings, it is obvious that this Court cannot rely on hearsay evidence to accede to the Plaintiff's claims.

In her testimony, specifically when PW1 was cross-examined, she testified to the effect that Habibu, the vendor informed her that his parents gave him the suit parcel of land. PW1 testified to the effect that she had no any evidence to prove Habibu's allegations. The same implies that PW1 was not certain if Habibu was authorized to sale the suit land. Subsequently, PW1 was required to prove if Habibu Mpeta was the lawful owner of the suit land or an administrator of the estate of his late parents' land, or was authorized by the owner to sale the same to PW1. That means Habibu Mpeta had no capacity to deal with the property of the deceased in a manner that he thinks fit subject to the law.

Had it been proved that Habibu was the administrator of the estate of his late father, then the requirement of consent could not be an issue in the instant case. In the case of **Mohamed Hassan Mayasa Mzee v**

Mwanahawa Mzee [1994] TLR 225, the Court of Appeal of Tanzania held that:-

"No consent of the heirs needed when the administrator appointed by the court is dealing with the selling of the deceased property."

Equally, in the case of **Aziz Daud v Amini Ahmed Ally & Another**, Civil Application No. 30 of 1990, the Court of Appeal of Tanzania held that: -

"Once a person is appointed an administrator, he has a mandate to deal with the assets of the deceased as he may think fit subject only to the law."

Guided by the above holdings of the Court of Appeal of Tanzania, I find that PW1 bought a piece of land from a person who had no capacity or mandate to enter into a Sale Agreement with her.

On their side, the Defendants tried to prove that they are lawful owners of the suit land. Simon Paulo Nhumba testified to the effect that in 1985 he was the caretaker of Athuman Mpeta and he heard that Athuman Mpeta transferred his ownership over the suit land to Heaven Origenes Mtui. But reading DW1's evidence, I have noted that his testimony is not supported by any documentary evidence. It is hearsay evidence.

On his side, Masoud Msangi (DW5) testified to the effect that he is the lawful owner of the suit land measuring 19 acres located at Tegeta 'A'

Goba from Hamisi Mfaume Sekonde in 1991. DW5 testified to the effect that he bought the suit in 1991 and he lawfully occupied the same since 1991. However, he did not tender any Sale Agreement to prove his ownership over the suit land. The 4th Defendant did not call his vendor Hamisi Mfaume Sekonde to prove his allegations. It is worth noting that failure to call the material witness means that Hamisi Mfaume Sekonde was not the vendor. Hence, DW5 has failed to prove his case.

On his party, Heaven Origenes Mtui (DW4) testified to the effect that he is the lawful owner of the suit land located at Tegeta 'A' Goba, he bought the same from Athumani Mpeti in July 1986. To substantiate his testimony he tendered a Sale Agreement (Exh.D7). Heaven Origenes Mtui testified to the effect that in 2015, he sold the suit lands to the 2nd and 3rd Defendants and there were no any claims from the Plaintiff until 2017.

In proving their ownership over the suit land, Sikitu Hassan (DW2) and Simon Efrem (DW3) testified to the effect that they are lawful owners. Each of them is owning a piece of the suit land measuring 25 x 30 meters located at Tegeta 'A' Goba (Exh.3) and (Exh.5) respectively. The evidence shows that they bought the said suit land in 2015 from Heaven Origenes Mtui, the 5th Defendant.

There was yet another piece of evidence from the Plaintiff and Defendants that is worth mentioning at this stage. This is the fact

that all parties save for the 4th Defendants tendered Sale Agreements to prove their ownership over suit land.

It is worth noting that in a situation where parties possesses Sale Agreements, the Court is required to examine the validity of the Sale Agreement. The first person to occupy the suit land, stands a better chance to be a lawful owner. The evidence on record and documentary evidence proves that Heaven Mtui (DW5) occupied the suit's land earlier than the Plaintiff. The evidence shows that DW4 bought the suit land way back in 1981 and the Plaintiff testified to the effect that, she bought the suit land in 2000.

In addition, this court needs to determine the source of the acquisition of the disputed land and find out whom between the Plaintiff and Defendants legally occupied the suit land. In the case at hand, the source of acquisition of the disputed land is well elaborated by DW5 which enabled him to transfer the said suit land to DW2 and DW3. This evidence substantiates the proper acquisition of land which entitled the first vendor to transfer the suit land to DW5 and DW5 to transfer the suit pieces of land to DW2 and DW3. On the other side, the source of the acquisition of the suit land is not in favour of PW1 because she has failed to establish if the vendor was a legal owner of the suit land hence had capacity to sale the suit land to her.

Another shortfall is failure for PW1 to call an important witness. It is an undisputable fact that Mr. Habibu Mpeta was an important witness to support PW1's evidence. Unfortunately, Habibu Mpeta was not called to testify in court. Failure to do so implies that if the vendor was called, she would have given evidence contrary to the Defendants' interests. In the circumstances, this court is entitled to draw an adverse inference against that failure. In the holding of this court in **Hemedi Saidi v Mohamedi Mbilu** [1984] TLR 113, it was held that:-

“Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests.”

The above authority squarely applies in the instant case, PW1 was required to call Habibu Athumani Mpeta to prove before the Court whether he was authorized to sale the suit land to PW1. Failure to call a material witness in court renders the Plaintiff's evidence unsubstantiated.

In civil cases, the person who desires to have the Court find in his favour proves her/his case. The standard of proof required to convince the Court is on the balance of probabilities consistent with sections 110, 111, 112, and 113 of the Evidence Act, Cap.6 [R.E 2019]. At the end of all this, this Court is convinced that the Plaintiff's case as gathered from the evidence

on record her evidence is not credible. That is to say, the first issue is not answered in favour of the Plaintiff.

Next for consideration is the last issue, *to what reliefs are parties entitled to*. In light of the evidence adduced before this Court, it is clear that the Plaintiff did not prove her claims against the 2nd, 3rd, and 5th Defendants therefore she is not entitled to any reliefs.

Thus, I fully subscribe to the submissions made by the Defendants in their Witness Statements of Defence and the 2nd, 3rd, 4th and 5th Defendants' counsels in their final submission that Plaintiff has failed to establish her case therefore her suit be dismissed. To that effect, I find no sufficient reason why the 2nd, 3rd, and 5th Defendants should be deprived of the costs of the suit because they have incurred costs in this endeavour. These are costs involved in the suit which the Plaintiff must shoulder.

In the upshot, I proceed to dismiss the suit. The 2nd, 3rd, and 5th Defendants are entitled to costs.

Order accordingly.

Dated at Dar es Salaam this date 11th May 2023.




A.Z.MGEYEKWA

JUDGE

11.05.2023

Judgment delivered on 11th May 2023 in the presence of Mr. Pongolela David, learned counsel for the Plaintiff also holding brief for Mr. Adrian Mhina, counsel for the 1st Defendant, Mr. Shayo, counsel for the 2nd, 3rd, and 5th Defendants and Mr. Nazario, learned counsel for the 4th Defendant.



AH
A.Z.MGEYEKWA

JUDGE

1.05.2023

Right to appeal fully explained.