

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

AT DAR ES SALAAM

LAND CASE NO.195 OF 2022

NURU MOHAMED KIHIO.....PLAINTIFF

VERSUS

MSHUZA MOHAMED KIHIO *Administrator of*

the estate of the late **MOHAMED AMIRI KIHIO.....1ST DEFENDANT**

MWESIGWA MUHINGO

T/A MBAMBAZI ADVOCATES.....2ND DEFENDANT

KIMBUNGA AUCTION MART.....3RD DEFENDANT

JUDGMENT

05/05/2023 & 07/06/2023

L. HEMED, J.

The plaintiff and the 1st defendant are relatives. The plaintiff is the uncle of the 1st defendant. The epicenter of the dispute is the ownership of property described as **Plot No.50 Block 45C, Kijitonyama, Kinondoni -Dar es Salaam**, registered under **Title No.186240/123**. The plaintiff, **NURU MOHAMED KIHIO**, claims to be the owner of suit land while the 1st defendant who is the administrator of the estate of the late **Mohamed Amiri Kihio** claims it to be part of the estate he administers.

The plaintiff knocked the gates of this Court alleging that, on 16th June, 2022, the 2nd defendant having the instructions of the 1st defendant, appointed the 3rd defendant to evict him from the suit premises. He alleged further that on 20th day of June, 2022 he was served with a seven (7) days' notice from the 3rd defendant requiring him to vacate from the suit property.

It was also claimed that on 31st July, 2022, the 2nd defendant issued a notice to all tenants in the suit premises requiring them not to pay rent to the plaintiff. On 1st August 2022, the 2nd and 3rd defendants entered the disputed land and removed six (6) machines which include; drill machines, grinder machine, less large machine, less small machine, milling machine and planer machine.

The plaintiff is thus claiming against the defendants jointly and severally for the following reliefs: -

- (a) A declaration that the defendants are trespassers to the suit land.
- (b) Payment of TZS. 55,000,000/= being the value of confiscated machines.
- (c) Payment of TZS. 12,500,000/= money lost during trespass.

- (d) General damages as the Court may deem fit to award.
- (e) Interests at commercial rate of 21%.
- (f) Payment of TZS. 9,000,000/= being rent arrears from the tenants; payment of TZS. 200,000/= per day as loss of business and general damages arising out of trespass with Court interest from the date of instituting the case to the date of full payment.
- (g) Costs of the suit.

The defendants, **MSHUZA MOHAMED KIHIO** (Administrator of the Estate of the late **Mohamed Amiri Kihio**), **MWESIGWA MUHINGO T/A MBAMBAZI ADVOCATES** and **KIMBUNGA AUCTION MART** disputed the claims by filing their Written Statement of Defence. The 1st defendant further stated to be the owner of the suit landed property as legal representative of the late **MOHAMED AMIRI KIHIO**.

In the course of determining the matter, the plaintiff was duly represented by **Mr. Steven Mayombo** learned advocate while the 1st and 3rd defendants enjoyed the service of **Mr. Constantine Kakula** learned counsel. At the commencement of hearing, the plaintiff decided to drop claims against the 2nd defendant. The matter proceeded amongst the

plaintiff, the 1st and 3rd defendants. The issues for determination were as follows: -

1. Who, between the plaintiff and the 1st defendant is the lawful owner of the suit premises namely Plot No.50 Block 45C, Kijitonyama, Kinondoni Dar es Salaam.
2. Whether the 1st defendant trespassed into the suit premises
3. Whether the eviction of the plaintiff carried out by 1st and 3rd defendant was lawful.
4. To what reliefs are the parties entitled.

The plaintiff's case had only one (1) witness, the Plaintiff himself who testified as PW1. The defendants' case had two (2) witnesses, the 1st Defendant who testified as DW1 and one Muhsin Mohamed Amiri Kihyo who adduced evidence as DW2.

The plaintiff tendered six (6) exhibits, which were, the Certificate of Occupancy-Title No.186240/123 (exhibit P1); the seven (7) days' notice to vacate from the workshop-dated 20th June, 2022 (exhibit P2); Notice to evict the trespasser dated 26th July, 2022 with Ref. No. AB.233/240/02/'C'/46 (exhibit P3); Valuation Report of Movable Assets

owned by Nuru Amiri Kihyo of July 2022 (exhibit P4); Notice to Tenants on ownership of the property-dated 31st July, 2022 with Ref. No.MA/MMK/22/01 (exhibit P5); and four (4) Lease Agreements between the plaintiff and Amina Lema, FM SMART LIFE, Stella Japhet and Raphael Masumbuko (collectively-exhibit P6).

The defendants managed to tender four (4) exhibits. The said exhibits comprised of the grant of letters of Administration of estate (exhibit D1); Judgment in Probate Cause No. 4/1995 dated 28th June, 1996 Kinondoni District Court (exhibit D2); Ruling in Probate and Administration Cause No.4/1995 dated 12th September, 2013 (exhibit D3); and Ruling of Kinondoni District Court at Kinondoni in Misc. Application No. 240 of 2015 dated 10th April, 2017 (exhibit D4).

PW1 testified to have acquired the suit land, Plot No. 50 Block 45 C KIJITONYAMA SERVICE TRADE AREA DAR ES SALAAM in 1981. He tendered the Certificate of Occupancy with Title No. 186240/123 (exhibit P1) to substantiate his assertion. He told the Court that in June 2022, he was served with the 7 days' notice to vacate from the suit premises. He tendered the said document (exhibit P2) dated 20th June, 2022 issued by

KIMBUNGA AUCTION MART. He testified further that after the expiry of 7 days he received another letter from the District Commissioner directing him to vacate from the suit property. He tendered the said document titled "*TAARIFA YA KUSUDIO LA KUMTOA MVAMIZI*" dated 26th July, 2022 with Ref. No.AB.233/240/02/'C'/46 (exhibit P3).

PW1 informed the Court that afterwards, the 3rd Defendant came to the disputed land and removed the machines which were in the premises. According to PW1, the value of machines was TZS. 69,000,000/=. He tendered the Valuation Report dated July 2022 (exhibit P4) to establish the value of the said machines.

PW1 further stated that the 1st defendant through Mbabazi advocate notified the tenants not to pay rent to the plaintiff. He tendered the said Notice dated 31st July, 2022 with Ref. No.MA/MMK/22/01(exhibit P5). To prove that he had tenants in the suit premises he tendered four (4) lease agreements (exhibit P6). The Plaintiff (PW1) prayed to be declared owner of the suit land and the 1st defendant be declared as the trespasser. In addition, he prayed the Court to consider the damage suffered by removal of the machines from the premises.

On his part, the 1st defendant who testified as DW1 told the Court that he is the administrator of the estate of the late **Mohamed Amiri Kihoyo**. To prove his avowal, he produced the letters of appointment (exhibit D1). He adduced that prior to his appointment, the Plaintiff was the administrator of the estate of his late father. He was however, revoked from administering the estate because he was misappropriating the estate of the deceased. According to DW1, among the misappropriated properties was the house with a workshop at Kijitonyama (the suit property).

He narrated further that the suit property belonged to his father the late **Mohamed Amiri Kihoyo**. He tendered the Judgment of Kinondoni District Court in Probate Cause No.4/1995 between MARIAM MOHAMED KIHIOYO vs NURU MOHAMED KIHIOYO (exhibit D2). According to DW1, the Judgment, at page 14 stated that the workshop at Kijitonyama is part of the estate of the late Mohamed Kihoyo.

He informed the Court that the plaintiff was revoked by the Court to administer the estate of his late father because he did not administer it well. He tendered the Ruling of the District Court for Kinondoni in Probate

and Administration Cause No.4/1995 dated 25th November, 2013(exhibit D3).

Additionally, he tendered another Ruling of the District Court of Kinondoni in Misc. Application No. 240 of 2015 dated 10th April, 2017 (exhibit D4) which mentioned the Workshop at Kijitonyama as part of the estate of the late Mohamed Amiri Kihyo. DW2 one Muhsin Mohamed Amir Kihyo the brother of DW1 corroborated the evidence of DW1. He told the Court that the suit piece of land, which had a workshop, was the property of the late Mohamed Amiri Kihyo. He averred to have witnessed when the workshop was erected and the machines being bought.

Having examined the evidence on record and the final submissions presented by the parties, I turn to determine the issues as were framed at the commencement of trial. The guiding principle in determining the same is as provided for under section 110(1) of the Evidence Act, [Cap 6 R.E 2019], thus:

“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.”

The first issue is on ownership of the suit landed property between the plaintiff and the 1st defendant. It should be noted that the suit landed property has been registered as Plot No. 50 Block 45 C KIJITONYAMA SERVICE TRADE AREA DAR ES SALAAM under Title No. 186240/123. It was thus the task of the rival parties to prove ownership of the same.

The plaintiff who was the sole witness of his own case testified to have owned the suit piece of land since 1981. He tendered the Certificate of Occupancy registered under Title No. 186240/123 in his name. On his part, the 1st defendant relied much on exhibits D2, D3 and D4 the decisions of the District Court for Kinondoni in trying to establish and prove that the suit land is part of the estate of the late Mohamed Amiri Kihyo.

I must state at the outset that I took time to thoroughly read the three (3) decisions of the District Court for Kinondoni in regard to Probate Cause No.4 of 1995. In the said decisions (exhibits D2, D3 and D4) nowhere the District Court mentioned Plot No. 50 Block 45 C KIJITONYAMA SERVICE TRADE AREA DAR ES SALAAM, with Title No. 186240/123 to be part of the estate of the late Mohamed Amiri Kihyo. What has been referred in the said decisions is a Workshop. However, it is not clearly

stated as to whether the referred 'workshop' is constructed on the suit land.

The suit landed property is a surveyed and registered land, it thus falls within the domain of the granted right of occupancy. Each disputant in this matter was obliged to prove that right of occupancy in respect of the suit plot was granted to him. I am holding so because section 29 (1) of the Land Act, [Cap 113 R.E.2019] provides thus:

"...where the Commissioner determines to grant a right of occupancy to a person ...he shall issue a certificate referred to as a "Certificate of Occupancy." (Emphasis supplied).

From the foregoing provision, a person who has the "Certificate of Occupancy" given by the Commissioner for Lands is the rightfully occupier or owner of the piece of land described in that Certificate. I am aware that upon grant of the right of occupancy, the 'Certificate of Occupancy' has to be registered in the Land Registry by the Registrar of Titles pursuant to section 27 of the Land Registration Act, [Cap 334 RE 2019]. In view of section 2 of the Land Registration Act (supra), once registered, the person whose name is in the land register becomes the owner of the particular

registered piece of land. Section 2 of the Act defines the word '**owner**' as follows:

*"2...**owner**" means, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered;"*

Evidence adduced by the defendants do not show that the late **Mohamed Amiri Kihio** was registered as the occupier of the suit landed property. Evidence available shows that, it is the Plaintiff who has been registered as the owner of the suit landed property since 1981. Section 35 of the Land Registration Act, (*supra*) goes thus:

"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 ..." (Emphasis added).

In the matter at hand the Plaintiff managed to establish that he is the registered owner of the suit landed property by tendering the Certificate of Occupancy/ Certificate of Title No. 186240/123. I do subscribe to scholarly

work of **Dr. R. W Tenga** and **Dr. S.J. Mramba** in their book, '**Conveyancing and Disposition of Land in Tanzania, Law and Procedure**', at page 330 where they said:

"The registration under a land titles system is more than the mere entry in a public register; it is authentication of the ownership of or a legal interest in a parcel of land. The act of registration confirms transactions that confer, affect or terminate 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."

I have endeavored to evaluate evidence of both parties in regard to ownership of the suit land. The Plaintiff has established that he is the registered owner of the suit landed property. The 1st defendant could not tender any proof to show that the deceased was the one registered as the lawful occupier/owner of the land in dispute. I am aware of the decision of the Court of Appeal in **Amina Maulid Ambali & 2 Others vs. Ramadhani Juma**, Civil Appeal No.35 of 2019 (Unreported) where it was principled that: -

"...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." (Emphasis underlined).

The relevant authorities did the grant of right of occupancy over the suit land to the plaintiff in 1981. I have gone through the entire evidence on record, I could not find anything or strong evidence having been stated to establish that the plaintiff obtained the said Certificate of Titles/ Certificate of Occupancy unlawfully. In his evidence, the 1st Defendant could not show if he has ever challenged the said grant of the right of occupancy over the suit land to the plaintiff. This would have been done by an action which would have involved the Commissioner for Lands and/ or the Registrar of Titles. After all, in the instant case, the defendants do not challenge the Certificate of Occupancy which the Commissioner for Lands issued to the Plaintiff nor the registration effected by the Registrar of Titles. As long as it remains unchallenged, it stands a proof of ownership of the suit land by the Plaintiff. In **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113 it was held that:

"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 present case, it is very clear that the plaintiff's evidence on ownership of the suit land is heavier than that of the 1st Defendant. The Plaintiff is the one who must win as regard the question of ownership and not otherwise.

The 2nd and 3rd issues were on whether the 1st defendant trespassed into the suit premises, and whether the eviction of the plaintiff carried out by the 1st and 3rd defendant was lawfully. Evidence on record shows that the 3rd defendant acting on the instructions of the 1st defendant entered the suit premises in attempt to evict the plaintiff. The 3rd defendants removed some machines therefrom believing to the property of the late Mohamed Amiri Kihyo. He also directed tenants in the suit premises not to pay rent to the plaintiff. Since it has been found that the suit property belongs to the plaintiff, then the act of the 1st defendant to take possession of the suit landed property amounts to trespass. It was also a mistake of law to evict the plaintiff from the suit premises as he is the lawful owner of the same, therefore the eviction was unlawful.

Regarding the reliefs which parties are entitled to, the plaintiff claimed the following reliefs: for declaration that the defendants are trespassers to the suit land; for payment of TZS. 55,000,000/= being the value of confiscated machine; for payment of TZS. 12,500,000/= money lost during trespass; general damages; Interests at commercial rate of 21%; for payment of TZS. 9,000,000/= being rent arrears from the tenants; for payment of TZS. 200,000/= per day as loss of business and general damages arising out of trespass with Court interest from the date of instituting the case to the date of full payment; and for costs of the suit.

The the law requires that every relief(s) sought to be proved on the required standard of the law. The plaintiff managed to prove ownership of the suit land. However, as to reliefs of payment of Tshs 55,000,000/=for the machines alleged to be confiscated and Tshs.12,500,000/=alleged to have been lost during trespass, the plaintiff has failed to prove. Apart from tendering the valuation report of the said machines (which has no endorsement of the Government Chief Valuer), the plaintiff never brought evidence showing that the said machine belonged to him. He never produced receipts showing that he purchased them. I am holding so because the decisions of the District Court for Kinondoni in Probate Cause

No.4 of 1995 have mentioned a workshop at Kijitonyama to be part of the estate of the late Mohamed Amiri Kihyo, probably, though was not the centre of the dispute, the deceased might have constructed a workshop in his brother's land as a licensee. Therefore, for that reason I hastate to grant what the plaintiff has prayed in respect of the alleged machines.

As to the amount of money alleged to have been lost during trespass, he has not shown any evidence, such as loss report, showing the alleged loss of money.

In line with reliefs of general damages, the principle was well expounded in the case of **Haji Associates Company (T) Ltd & Another vs. John Mlundwa** [1986] TLR 107 Mwalusanya, J (as he then was) stated that: -

"General damages are compensatory in nature as they are intended to take care of the plaintiff's loss of reputation as well as to act as a solatium for mental pain and suffering".

On that note, I find my self unable to agree with the plaintiff that he is entitled to general damages as prayed as he has failed to prove any loss he has suffered from the 1st defendant actions.

Moreover, the relief for payment of rent arrears can be claimed from the tenants and not the 1st defendant in this case. The fact that the plaintiff has been found to be the owner of the suit landed property, he is now entitled to claim payment of rent and rent arrears from the respective tenants.

In the final analysis, I find that the Plaintiff has managed to prove that he is the lawful owner of the suit landed property. He is so declared owner of the suit landed property, Plot No.50 Block 45C, Kijitonyama, Kinondoni Dar es Salaam. The fact that this matter involves close relatives, each party to bear its own costs.


L. HEMED
JUDGE
07/06/2023



COURT: Judgment delivered in the presence of **Mr. Steven Mayombo** advocate for the Plaintiff also holding brief of **Mr. Constatine Kakula** for the first and third Defendants. Right of appeal fully explained.


L. HEMED
JUDGE
07/06/2023

