

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 20 OF 2023

WEMA A. MIHAYO alias JEMA A MHIYAO..... PLAINTIFF

VERSUS

ZAITUNI HAMISI ALI.....1ST DEFENDANT

SIWEMA HAMIS ALI.....2ND DEFENDANT

JUDGMENT

8th & 26th June 2023

L. HEMED, J.

Parties to the matter at hand are relatives whereas the plaintiff is the aunt of both defendants. On 17th January 2023, the plaintiff herein **Wema A. Mihayo** alias **Jema A Mhiyao** filed the present suit against the defendants, **Zaituni Hamis Ali** and **Siwema Hamis Ali** claiming for ownership of **half** of the land described as **Title No. 91093, Plot No.4 Block No.18 situated at Mchikichi Street, Kariakoo Area, Ilala Municipality, Dar es Salaam**, registered in the names of the defendants herein.

The plaintiff alleged in her plaint that she acquired the suit landed property through inheritance from her late father, one ALI ABDALA

MHIYAO, back on 29th day of November, 1944, half of the property was given to her and the remaining half was given to her brother one HAMIS ALLY MHIYAO and the two became occupiers in common. It was alleged that in 2019, at a dismay, she came to learn through the Judgment of this Court dated 22nd July 2015, in Land Case No.115 of 2010, that the 1st Defendant was claiming ownership of the suit property alleging that the plaintiff had transferred the suit property to the defendants.

The plaintiff stated to have never transferred any of her right over the suit property to the defendants or anyone else. The plaintiff is thus praying for judgment and decree against the 1st and 2nd defendants as follows: -

1. A declaration that half of the land the Plot No. 4 Block 18 Mchikichi street, Karikoo Area Ilala Municipality at Dar es Salaam belongs to her.
2. A declaration that the Certificate of Title No. 91093, Plot No 4 Block No 18 Mchikichi Street was fraudulently obtained by the defendants.
3. A declaration that occupation by the defendant and any person claiming under them on the suit property is unlawful.

4. An order of perpetual injunction restraining the defendants from trespassing into the suit property,
5. General damages as the court may deem fit to grant
6. Cost of the suit.

It should be noted that on 2nd May 2023, this Court ordered the matter to proceed *ex parte* against the defendants following their non-appearance despite being duly served. **Mr. Derick Kahigi** and **Ms Janeth Kimule**, learned advocates, represented the plaintiff. At the commencement of hearing the following issues were framed:-

1. Whether the Plaintiff is the rightful owner of half shares of the suit landed property, Plot No.4 Block No.18 situated at Mchikichi Street, Kariakoo Area, Ilala Municipality, Dar es Salaam, with certificate of Title No. 91093.
2. Whether the defendants fraudulently obtained the certificate of Title No.91093, over the suit landed property.
3. To what reliefs are the parties entitled to.

The plaintiff's case was heard by way of witness statement. The plaintiff adduced evidence as PW1. She tendered three (3) exhibits,

which were Conveyance dated 29th November 1944 (P1); Judgement of this Court in Land Case No. 115 of 2010 and a Letter from the Registrar of Titles dated on 29th November 2022 (Collective P2).

PWI testified to own half of the property in dispute, described as Plot No.4, Block No.18 situated at Mchikichi Street, Kariakoo Area, Dar es Salaam. She stated to have inherited it from her late father one ALI ABDALA MHIYAO on 29th November 1944, of which property, was apportioned and divided from the other half of the landed property, bequeathed to her late brother one HAMIS ALI MHIYAO and they became occupiers in common of the whole property.

She adduced that the suit property is currently leased to the tenants and she has been the one collecting rent from the tenants. According to PW1, the 1st and 2nd defendants are daughters of her late brother, Hamis Ali Mhiyao, who was the co occupier of the other half share of the suit property. She told the court that her brother demised sometimes in 2004 and his son one KAISI HAMISI, a brother to the defendants, was dully appointed to administer the estate of the late HAMIS ALI MHIYAO, vide Probate Cause No.480/2007.

She recalled that at one point in time, sometimes in 2000s, she and her late brother instructed the defendants, to supervise the suit property and collect rent from the tenants on their behalf. She refuted to have transferred her right of occupancy over the suit property to the defendants.

It was the further testimony of the plaintiff that in 2019 she came to learn vide the copy of the judgment and Decree of this court, dated 22nd July 2015, in Land Case No.115/2010 that the 1st Defendant was claiming ownership of the suit property alleging that the plaintiff had transferred the same to the defendants. She also discovered that the defendants had fraudulently obtained the Title Deed No. 91093 by presenting to the land registry, the forged Deed of Gift. She insisted that the suit property belongs to her and she has never transferred any of her right of ownership over the suit property to the defendants. She PW1 adduced that the Deed of Title No 91093 in the names of the Defendants, was fraudulently procured from the land registry by the defendants.

She further told the Court that the purported deed of gift allegedly to have executed by the plaintiff is nothing but a creature of

forgery as there has never been any transfer of ownership of the suit property by deed of gift. PW1 asserted that she prompted the land registry in respect to the fraudulence by the defendants and requested for cancellation of the said Deed No.91093 where she was advised to seek remedy in court by suing the defendants.

To start with the 1st issue whether the Plaintiff is the rightful owner of half shares of the suit landed property, it is a trite law that in civil cases, he who alleges has a burden of proof. This is pursuant to section 110 of the Evidence Act, [Cap.6 R.E.2019]. This was cemented by the Court of Appeal of Tanzania in **Lawrence Magesa T/A Jopen Pharmacy v. Fatuma Omary & Rimina Auction Mart & Company Limited**, Civil Appeal No.333 of 2019 regarding the burden of proof that:-

"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act. It is equally elementary that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and the said burden is not diluted on account of the weakness of the opposite party's case."

In the matter at hand, my task is to find out if the plaintiff is the owner of the suit landed property. To prove the said issue, the plaintiff who testified as PW1 told the Court to have inherited the the suit land on 29th November 1944, from her later father one ALI ABDALA MHIYAO. The suit land was conveyed to the plaintiff and her brother HAMIS ALI MHIYAO who died in 2004. She tendered the Conveyance document (Exhibit "P1") which bears the names of the Plaintiff and her late brother one HAMIS ALI MHIYAO.

I extensively examined evidence on record, in fact it has been unequivocally established that the plaintiff is the rightfully owner of the half share of the suit landed property. This has been proved *vide* exhibit P1, the conveyance document.

Additionally, the ownership of the suit property by the plaintiff has been constructively shown in the judgement of this court in Land Case No.115 of 2010 over the same property. This is clearly shown at page 9 of the typed judgement thus:-

'However, since the plaintiff is the one appointed as an administrator of the estate of the late Hamis Ally Mhiyao and in his capacity he is entitled to administer all matters pertaining to the ½ share on behalf of all heirs of Late Hamis Ally Mhiyao including the defendant, then

prudently and in the balance of convenience I restrain the defendant from trespassing into the suit premises unless she obtains consent from the plaintiff."

The above decision recognises the plaintiff herein as the joint owner of the plot in dispute with one Hamis Ally Mhiyao. Therefore, this court is joining hands with the decision of Mziray J, that since half of the suit property is part of the estate of the late Hamis Ally Mhiyao then half of the same property is owned by the plaintiff herein.

The 2nd issue was on whether the defendants fraudulently obtained the certificate of Title No.91093, over the suit landed property. I got an opportunity to read the Judgment of this Court in Land Case No.115 of 2010 (exhibit P2) composed by Hon. R.E.S. Mziray, J (as he then was). I discovered that the said judgment concerned the same suit property, Plot No.4 Block 18, Mchikichini Street, Kariakoo, Dar es Salaam. In that case, this Court declared half of the shares of the suit property is part of the estate of the late Hamis Ali Mhiyao, the brother of the plaintiff herein. In the said decision, the Court also disregarded the purported Deed of Transfer of ownership of the suit landed property to the defendants. The court took that position after the defendants having failed to call the plaintiff who was the material witness to prove the

purported deed of gift which was alleged to have been signed by Wema Ally Mhiyao @ Jema and Hamisi Ally Mhiyao to transfer the title to the defendants. I am bound to take the same position that the said document used to transfer the title to the defendant was not authentic. Therefore, there were elements of fraud in obtaining the certificate of Title No.91093.

In the final analysis, I find that the Plaintiff has managed to prove her case as lawful owner of the suit landed property. I do hereby declare her owner of the half of shares of landed property located at Plot No.4 Block 18 situated at Mchikichi Street, Kariakoo Area Ilala Municipality Dar es Salaam, with a certificate of Title No.91093. The plaintiff is entitled to costs of the suit. It is so ordered

DATED at DAR ES SALAAM this 26th June 2023

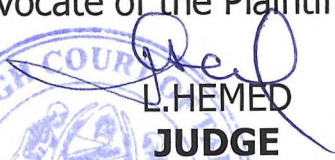


L. HEMED
JUDGE



COURT: Judgement is delivered this 26th June 2023 in the presence of

Mr. Derick Kahigi advocate of the Plaintiff. Right of appeal explained.



L. HEMED
JUDGE

