

IN THE HIGH COURT OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND CASE NO.86 OF 2022

JUMA OMARI NYAMGUNDA (As administrator of estate of late **TUKAE OMARI SALEHE NYAMGUNDA**.....**PLAINTIFF**

VERSUS

AMINA OMARI NYAMGUNDA(As administrator of estate of late **FATUMA OMARI SALEHE NYAMGUNDA**.....**DEFENDANT**

J U D G M E N T

Date of last Order:28/08/2023

Date of Judgment:20/11/2023

K. D. MHINA, J.

Parties to this suit are relatives who battle over the plot's ownership described as Plot No. 129 Block "I" located at Wailes Area, Miburani Ward, within Temeke District.

They are all the offspring of the late Omar Saleh Nyamgunda, who had six children, five of whom were born from the same mother and one from a different mother.

The five are Hamza Omar Saleh Nyamgunda (1st born), Amina Omar Saleh (2nd born), Fatuma Omar Saleh Nyamgunda(3rd born), Tukae Omar Saleh Nyamgunda (4th born), and Ramla Omar Salehe Nyamgunda (5th born).

While Juma Omar Nyamgunda was from a different mother.

Therefore, the plaintiff is the half-younger brother of the defendant, and both step into the shoes of their deceased relatives as administrators of their estates. While the plaintiff administers the estate of his late half-sister, Tukae Omar Saleh Nyamgunda, the defendant administers the estate of her late younger sister, Fatuma Omar Saleh Nyamgunda.

In the plaint, the plaintiff alleges that the suit plot was the property of the late Tukae Omar Saleh Nyamgunda. The late Tukae was granted the ownership of the suit land by the letter of offer. According to annexure JON-02 attached to the plaint, the letter was with reference no. LD/TM/I/129/4/AM dated 8 November 1979.

The plaintiff further alleges that, while he continued to execute his duties as the administrator of the estate by dividing the deceased

properties, he was in effective occupation of the suit plot without any interference.

In 2022, the defendant interfered with the occupation of the suit land by evicting the tenants, alleging that the suit plot belonged to her through her late mother, Fatuma Omar Saleh Nyamgunda.

This triggered the plaintiff to seek relief from this Court. He now prays for Judgment and Decree against the defendants for the following reliefs;

- i. An order that the plaintiff is the lawful owner of the suit premises, i.e., Plot No. 129 Block "I" located at Wailes Area, Miburani Ward within Temeke District, encroached by the defendant.*
- ii. An order for payment of general damage of TZS. 100,000,000/=*
- iii. An order for payment of interest on the decretal amount at the rate of 30% monthly from the date of Judgment to the full payment.*
- iv. Costs be provided for.*
- v. Any other relief deemed proper by the Court.*

In her written statement of defense, the defendant vehemently disputed the claim. She confronted the plaintiff by alleging that the plaintiff was not the administrator of the estate of the late Tukae Omar Saleh Nyamgunda because, after her death on 30 July 1999, Fatuma O. Kapera petitioned for and was granted administratrix of the estate by Mbagala Primary Court vide Probate Cause No. 288 of 2011. That grant was never revoked.

She further alleges that she and the late Fatuma Omar Saleh Nyamgunda were sisters, and Fatuma died childless.

On the letter of offer for Plot No. 129 Block "I" dated 2 May 1978, the defendant alleges that the same was issued to Omari Salehe as a guardian of Hamza Omari.

Furthermore, she alleges that after Salehe Hamza Omari and his sister Mfanyeje Hamza Omari attained the age of majority, on 16 April 1993, in the presence of family members, they decided to exchange their plot (suit plot) with their aunty Fatuma Omari Nyamgunga who gave them her house located at Mbagala Kibondemaji. The exchange was affirmed by an affidavit before Mbagala Primary Court dated 19 April 1995.

Thus, the defendant prays for the suit be dismissed with costs.

The above "*cause celebre*," as shown in the pleadings, put the parties at issue; therefore, on the first day of the hearing, the following issues were framed for the determination of this suit, namely:

- i. Whether the plaintiff is the legal owner of the disputed property by virtue of administratorship of the estate of the late Tukae Omari Salehe Nyamgunda.*
- ii. To what reliefs are parties entitled?*

At the hearing, the plaintiff was represented by Ms. Tukilage Frank, a learned Advocate, while the defendant was represented by Ms. Hawa Naanyanzi and, in the final stages, by Mr. Stevens Maduhu, both learned advocates.

In support of his case, the plaintiff called three (3) witnesses: **Juma Omari Nyamgunda**-administrator of the estate of Tukae Omari Salehe Nyamgunda (the plaintiff), who testified as PW1; **Luka Ruben Chaula**, the Land Officer from the Temeke Municipal Council, who testified as PW2; and **Fatuma Issa Nyamgunda**, a relative to both parties to the suit, who testified as PW3.

On her side, in a bid to support her case, the defendant called four (4) witnesses: **Abdul Said Mbotto** (holder of a Special Power of Attorney for the defendant), who testified as DW1; **Hatia Omari Seleman**, a relative to both parties to the suit, who testified as DW2; **Ramla Omari Nyamgunda**, plaintiff's half-sister and defendant's younger sister, who testified as DW3 and **Omar Saleh Nyamgunda** a relative to both parties to the suit, who testified as DW4.

A total of four (4) exhibits were tendered on the plaintiffs' side, while on the defence side, a total of eight (8) exhibits were tendered. Both documentary exhibits.

In his testimony (**PW1**), **Juma Omari Nyamgunda** testified that he was the administrator of the estate of his late sister Tukae Omari Salehe Nyamgunda. To that effect, he tendered;

- i. Letter of Administration granted to Juma Omari Nyamgunda in Probate and Adm. Case No. 61 of 2019 on 8 December 2020 as Exhibit P.1.*

He testified that the property in dispute, i.e., Plot No. 129, Block I, Temeke, belonged to the estate of his deceased sister by a letter of offer issued to the deceased in 1979. Two official search reports dated 2021 and

2022 indicated the late Tukae Omari Nyamgunda as the sole owner of the property. To that effect, he tendered;

- ii. The letter of offer with Ref. LD/TM/I/129/4/AN dated 8 November 1979 as Exhibit P.2.*
- iii. The official search reports dated 26 October 2021 and 16 November 2022 collectively as Exhibit P3.*

PW1 testified further that after being appointed administrator, he realized that the disputed plot had a title deed; therefore, he reported the matter to the police and obtained a loss report.

He stated that the deceased purchased the plot in dispute and constructed the house after obtaining a loan from the Bank, and she was a public servant. To that effect, he tendered;

- iv. A letter dated 12 December 1981, Inspection form, and Redemption statement collectively as Exhibit P4.*

When cross-examined, PW1 stated that he did not remember exactly when the late Tukae passed away, but it was between the years 1980 and 2000, and she died while living at Mbagala.

Also, he stated that he did not know if the children of the late Tukae ever sought the letters of administration.

On further cross-examination, he stated that the late Fatuma died in 2017 while residing in the disputed house at Kitamondo Street, Temeke.

He also stated that the lost title deed was with No. 26997. On Exhibit P2, he stated that he could not say anything regarding the name, which was crossed apart for being the name of Omar Saleh, his father.

PW2, Luka Ruben Chaula, testified that the records in their office indicated that Plot No. 129 Block I, Temeke, owned by Tukae Omar Nyamgunda with Certificate of Title No.26997.

He further stated that the tenure of ownership had expired; therefore, a review was needed.

When cross-examined, PW2 stated that Exhibit P2 was addressed to Omar Saleh c/o Tukae Omari Saleh, and then Omar Saleh (the first name) was crossed/cancelled, and only the name of Tukae Omar Saleh was left.

Further, he stated that there had never been a title over the property issued to Omar Saleh.

The last plaintiff witness was **PW3, Fatuma Issa Nyamgunda**, who testified to the following effect: that the plaintiff was her uncle and the defendant was her aunty.

She stated that the house in dispute belonged to the late Tukae. All documents bear her name, notwithstanding the loss of the title deed.

She concluded by testifying that the search results confirmed that the deceased owned the house.

In the defence case, **DW1, Abdul Said Mbotu** (holder of the special power of her sick mother, Amina Omar Nyamgunda-the defendant) testified that the defendant was the second born to a family of five children of Omar Saleh from the same father and mother. Others were Hamza Omar Saleh, the firstborn; Fatuma Omar Saleh Nyamgunde, the thirdborn; Tukae Omar Saleh Nyamgunda; and Ramla Omar Salehe Nyamgunda.

On the other hand, Juma Omar Nyamgunda, the plaintiff, is their brother from a different mother but the same father.

Furthermore, Hamza Omar Saleh had two children: a daughter called Mfanyeje Hamza Omar and a son, Saleh Hamza Omar.

DW1 went further by testifying that the disputed land had a long history, and Hamza Omar Saleh was crucial to history as he was the source of why the disputed land was acquired.

He stated that Hamza, who died in 1977, was an employee of the District Council of Dar es Salaam attached to the Land Office at Temeke. He was the one who applied for ownership of the suit land but died before its acquisition.

After the burial, in a family meeting where also the staff from the Land Department of Temeke attended, it was agreed that Omar Saleh would follow up on the affairs of his deceased son, including the acquisition of the suit land.

Following a follow-up, Omary Saleh was issued a letter of offer on 2 September 1978 as guardian of Saleh Hamza Omar. To that effect, he tendered;

i. Letter of offer dated 2 September 1978 as Exhibit D.1.

Thereafter, Omar Saleh started to develop the suit land by using the benefits received from his deceased son's employment by constructing a structure of two rooms and a living room, but in 1984, he passed away.

The structure was left and abandoned, but later, the children of Omari Saleh from the same mother agreed to roof the structure, and they did so.

The late Tukae was living in Tandika in a rented residence. She moved into the house in 1986, where she lived with another relative, Hatia Omar Seleman, until 1988, when she moved to Mbagala. Hatia remained in the house. She left for Mbagala to live in the house of Fatuma Omar Nyamgunda, where the latter was living with the former's children.

At that time, Hamza's children were still younger.

In 1993, Hamza's children were given the structure (i.e., the suit land) by their aunties. Also, Juma Omar Nyamgunda and other family members were present. But Hamza's children stated they could not develop the suit land. Thus, an agreement was entered, swapping the structure with their aunt Fatuma Omar Nyamgunda in respect of her house situated at Kibonde Maji.

A meeting was arranged for handover, and thereafter, documents were signed at the Primary court. To that effect, he tendered;

i. Hati ya Kiapo dated 19 April 1995 as Exhibit D.2

DW1 further stated that Tukae was alive when the agreement to exchange was effected. She took part in the meeting.

After that, Fatma started to develop the structure by adding two more rooms connected to electricity and water. To that effect, he tendered;

- i. *Electricity request form No.DSM/T/MEC/S/L in respect of Fatuma Omar Nyamgunda as Exhibit D.3.*

In his further testimony, DW1 stated that in 1993, Tukae was residing in Mbagala Kabondemaji in the house that belonged to Fatuma before the exchange.

In 2006, Fatuma built a modern house in the open space, in the same plot, and Fatuma was residing with her sister Hatia Omar Seleman and tenants. It was in 1993 when Fatuma started to live with Zarina, the daughter of her younger sister, the late Tukae. In 2017, she died, and Amina Omar Nyamgunda was appointed as the administrator of his estate. To that effect, he tendered;

- i. *Letter of administration dated 17/07/2017 granted to Amina Omar Nyamgunda Exhibit D.4.*

When the administrator started to accomplish her responsibility, and when she went to the house, she met Zarina, who told her that she was not

entitled to administer the house, for they had already petitioned for the appointment of an administrator in respect of the house in the High Court.

Consequently, Amina filed a case at Temeke Primary Court regarding being prevented from fulfilling her responsibilities as an administratrix of the estate of Fatuma One Nyangunda. The case was decided in favour of Amina Omar Nyamgunda. To that effect, he tendered;

- i. The decision in respect of Probate No. 384 of 2019 as Exhibit D.5.*

Amina continued as administratrix, in which case she approached the Land office at Temeke Municipal Council regarding the suit land by presenting the letters of administration and the original offer. She was informed by PW2, Luka Ruben Chaula, that her documents correlated with those in the file. He prepared documents for payment in respect of Title preparation. To that effect, he tendered;

- i. Documents (Invoice) dated 3 August 2020 as Exhibit D.6.*

The payments in respect of the land rent and title deed were effected on 20 September 2020. To that effect, he tendered;

- i. The receipts (bank paying slip) admitted as exhibit D.7.*

DW1 also testified that Tukae died in 1999 at Mbagala, and Fatuma Omari Kapera, her firstborn, was appointed to administer her estate by Mbagala Primary Court. To that effect, he tendered;

i. Decision in Probate No.288/2011 as Exhibit D.8.

When DW1 asked about the children of the late Hamza, he stated that they were both passed away.

In her evidence, **DW2, Hatia Omar Seleman** testified that both parties to the suit were her relatives.

She testified that the suit land was given to Hamza as a gift for the best worker. She knew Hamza as he was working with her husband at Temeke Municipal Council, who was also given a plot at Uwanja wa Taifa area.

She also stated that when Hamza died, she left behind the children and her parents. Later, his children Saleh and Mfanyeje passed away.

After the passing of Hamza, his father, Omar Salehe, collected his terminal benefits and built a hut of two rooms and a living room in the suit

land that belonged to Hamza, but he could not finish the construction. She once lived in a house in dispute after being divorced by her husband.

She stated that once Tukae told her, she would complete the house and move into the house. Tukae was the one who asked her to live together in the house, and they moved in 1988. The house had only one door without a toilet and windows.

Fatuma, who built a house at Mbagala, took Tukae's children to live with her at Mbagala, and later Tukae also moved to Mbagala.

Later, Fatuma constructed two rooms at the suit plot. At that time, Hamza's children were still young. Saleh was living at Mkamba Village with his grandfather and grandmother, and Mfanyaje was living with Fatuma.

DW2 further testified that the house in dispute belonged to Hamza's children, but later, they agreed to an exchange in which the children were given a house belonging to Fatuma.

After that, Fatuma connected the water to the house and added rooms. Zarina came much later after Fatuma got sick.

She concluded by testifying that Tukae was living in Mbagala after moving from the suit premises, and Fatma built a modern house in the suit premises.

DW3, Ramla Omar Nyamgunda, testified to the following effect that the parties to the suit were her relatives.

She further testified that Hamza had two children, Saleh and Mfanyeje. In 1969 or 1970, he moved to Dar es Salaam from the rural area, got a job at Temeke Municipal, and later got a plot at Kitomondo, Temeke.

Hamza died in 1977, and his fellow workers attended the funeral. Further, they told their father, Omar Saleh Nyamgunda, to make a follow-up on the benefit of the deceased at his workplace. After a follow-up, he was given an offer regarding the suit premises and got the deceased benefits. He erected a two-bedroom structure, but he died before its completion. The structure was about to be roofed. After a family meeting, it was decided to complete the roof structure by using the iron sheets brought from their village

DW2 further stated that Tukae was working at the University, and Fatuma was also working. Tukae was struggling and was advised to move the house once the rooms were roofed. She moved to the premises in 1986, and she was a caretaker sort of on the premises. She moved alone, but later, Hatia Omar Selemani joined her.

She further testified that the children of Hamza were to be given their property as directed by the late Omar Saleh. And that was done after a meeting held in 1993 in which she participated.

At that time, the children were already grown but could not do anything with the structure. Therefore, they exchanged the premises with Fatuma Omar. After that, Fatuma developed the suit premise by constructing a modern house. She said she was part of the family and was aware of what was happening. Fatuma stated to live at the suit premises after the exchange. In exchange, Hamza's children were given a house at Mbagala.

In further testimony, she stated that Tukae did not have a house on a plot. She completed school in 1970 and went to Kisutu but got pregnant before finishing school. Tukae's children were living in Mbagala at Fatuma premises.

Tukae died in 1999 in Mbagala, and they did not sit to decide the issues of her estate. But after the death of Fatuma, they sat, the seven of them, and Amina was appointed to administer the estate. At that meeting, Juma was also present.

The last defence witness, **DW4, Omar Saleh Nyamgunda**, testified that the plaintiff was his grandfather and the defendant his grandmother, the sister of his late grandfather.

He stated that the dispute arose after the death of Fatuma Omary Nyamgunda on 17 July 2017, but exactly it started in 2019. There were two sides; one wanted Amina Omary Nyamgunda to administer the estate of Fatuma Omary Nyamgunda, and another side wanted Juma Omary Nyamgunda.

Fatuma Omar Nyamgunda lived at Temeke, while Amina Omar Nyamgunda was at Mkamba within the Mkuranga District. Amina was a sister of Fatuma.

Having summarized and considered the evidence brought before this court, the following are the deliberations of this Court at disposal.

Starting with the 1st issue as to whether the plaintiff is the legal owner of the disputed property by virtue of administratorship of the estate of the late Tukae Omari Salehe Nyamgunda will sail and guided by the principle enunciated in section 110 (1) of the Evidence Act, Cap. 6 [R.E. 2019 as a standard in proving a case.

The section reads;

"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, I will be guided by the case of **Hemedi Said vs. Mohamedi Mbilu** (1984) TLR 113, where it was held that;

"He who alleged must prove the allegations."

Therefore, the burden of proof in this matter lies on the plaintiff to prove that he is the lawful owner of the suit plot by virtue of administratorship of the estate of the late Tukae Omari Salehe Nyamgunda.

In this matter, both parties tendered the letters of offer. The plaintiff tendered a letter with reference no LD/TM/I/129/4/AN dated 8 November 1979 (Exhibit P.2). That letter was addressed as follows;

*To: Ndugu Omari Salehe
c/o Tukae Omari Saleh
P.O Box 9571
Pwani-DSM*

Then the name, Ndugu Omari Salehe and c/o were cancelled by ink pen.

On the other hand, the defendant tendered a letter of offer with reference number Land Office No. 204100 dated 4 May 1978. (Exhibit D1)

The letter was addressed to Omar Saleh (as a guardian of Salehe Hamza Omari).

Both letters were for plot no. 129 Plot "I" Temeke Dar es Salaam. Therefore, from the documentary evidence, the plot in dispute is the same.

In his evidence, PW1 stated that the plot had a title deed in the name of Tukae Omari Salehe Nyamgunda, but the title deed was lost. Also, PW2, a Land Officer from Temeke Municipal Council, testified that the records in their office indicated that Plot No. 129 Block I, Temeke, owned by Tukae Omar Nyamgunda with Certificate of Title No.26997, whose tenure has already expired.

From above, the following can be gleaned;

One, nothing was tendered to prove that the title deed was lost, and

Two, PW2, apart from his mere words, failed to tender any document to prove the existence of the title deed over the suit land in the ownership of Tukae Omar Nyamgunda.

Therefore, what is left are the two letters, exhibit P2 and Exhibit D1.

From above, I have the following regarding the two documents;

One, exhibit P2, was issued on 8 November 1979, while Exhibit D1 was issued on 4 May 1978. On this, what is applicable is the priority principle. The Court of Appeal in **Ombeni Kimaro vs. Joseph Mishili t/a Catholic Charismatic Renewal**, Civil Appeal No. 33 of 2017 (Tanzlii), held that;

"The priority principle is to the effect that where there are two or more parties competing over the same interest, especially in land, each claiming to have title over it, a party who acquired it earlier in point of time will be deemed to have a better or superior interest over the other".

In this matter, by priority principle, the document issued to Omar Saleh (as a guardian of Salehe Hamza Omari) has a superior interest than the one alleged to be issued to Tukae Omar Nyamgunda. Therefore, at the time the alleged PW1 was issued, DW1 was already in existence.

Two, exhibit P2 is doubtful; as already shown above, it was addressed to Omar Saleh c/o Tukae Omar Saleh, but the name Omar Saleh was cancelled by the ink pen. No explanation was given by either PW1 or PW2 as to why it was cancelled and the validity of that document after that

cancellation. PW2 just stated there could be errors, which was why that cancellation occurred. That was his opinion and not a fact. Therefore, even by a mere look, exhibit P1 is doubtful.

Three, even if we believe the evidence of PW1 and PW2 that there was a title deed emanating from that letter of offer, there must still be evidence of how the late Tukae Omar Nyamgunda acquired the suit plot.

The Court of Appeal in **Nacky Esther Nyange vs. Mihayo Marijani Wilmore and another**, Civil Appeal No. 2017 of 2019 (Tanzlii), held that;

"...the Certificate of Title is conclusive proof of ownership of land".

But the above is the general principle because there are exceptions to that general position. On this, again, the Court of Appeal in **Jacqueline Jonathan Mkonyi and another vs. Gausal Properties Ltd**, Civil Appeal No. 311 of 2020 (Tanzlii), held that;

"..... we wish to observe that this is not a case of end justifying the means, so we agree that registration of land would not ipso facto prove title in the absence of evidence establishing how one got the title."

This exception to the general rule establishes the **principle of tracing**. That means in certain circumstances, the background check and

evidence of how a person acquired the land is necessary to establish how a person acquires that land.

In the instant suit, on the side of the plaintiff, there was no evidence of how Tukae Omar Nyamgunga acquired the suit land in 1979, while in 1978, after the death of his brother Hamza Omar Nyamgunda, the same land was registered in the name of his father Omar Saleh as the guardian of his grandson Saleh, i.e. the son of the late son Hamza Omar Nyamgunga.

On the other hand, in the defence case, there was evidence of how the suit land was acquired. The plot in dispute was awarded to late brother Hamza Omar Saleh Nyamgunda by his employer, Temeke Municipal Council, as a gift as the best worker. Sadly, Hamza Omar Saleh Nyamgunda died in 1977, leaving behind two young children, a girl named Mfanyeje and a son named Saleh. At the time of his death, he was yet to officiate his ownership of the land in dispute by registration.

His late father, Omar Saleh Nyamgunda, was a guardian of his grandchildren; on 2 September 1978, the letter of offer was issued to him as a guardian of Saleh Hamza Omari.

Therefore, by the principle of tracing, the suit land was given to Hamza, but after her passing, it was acquired by Omar Saleh Nyamgunda as a guardian of Saleh Hamza Omari.

Flowing from above, the evidence on record indicated that Hamza's children, after becoming adults, were given the suit plot. According to DW3, that was the direction of their late father, Omar Saleh Nyamgunda. According to DW1 and DW3, in 1993, the children of Hamza were given the suit house by their aunties and other relatives, including the plaintiff, but they could not develop the plot. Therefore, they exchanged the suit premises with their Fatuma Omar Salehe Nyamgunda, who gave them the house located at Mbagala. According to DW3, she attended that meeting and that was what happened.

Later, the children of Hamza and their aunty, Fatuma legalized that exchange at Temeke Primary Court by affidavits (Hati za Viapo), exhibits D2 collectively.

In exhibit D2, the first document regarding the suit plot (Plot No: 129 Block "I" dated 19 April 1995, signed by Mfanyeje Hamza and Saleh Hamza, they deponed that;

HATI YA KIAPO
YAH: PLOT NO. 129 KITALU I
KITOMONDO STREET TEMEKE

Mimi Salehe Hamza, Kabila Mndengereko Umri 25 Nakaa Mkamba Kizapala dini Ismal, kwa niaba ya dada yangu Mfanyeje Hamza tunathibitisha kwa kiapo kuwa Banda lililotajwa hapo juu ni mali yetu hatuna shirika na mtu yeyote. Banda hilo tulipewa na Babu yetu Omari Salehe wakati tukiwa wadogo na sasa yeye ni marehemu.

Nasi kwa hiari yetu tumeamua kubadilishana banda letulililotajwa hapo juu na shangazi yetu Fatuma Omari Nyamgunda kwa kuwa hatuna uwezo wa kuliendeleza banda hilo naye ametupa nyumba yake ambayo tunaishi hivi sasa iliyopo Mbagala Kibondemaji.

Kwa kiapo hiki tunaiomba idara inayohusika ibadilishe jina la marehemu Babu yetu Omari Salehe na Salehe Hamza Omari na kuandika Jina la shangazi yetu Fatuma Omari Nyamgunda.

Tunatoa tamko hili mbele ya Mahakama tukijua kuwa yote tuliyoyasema hapo juu ni ukweli mtupu lolote likitokea kinyume na kiapo hiki litakuwa jukumu letu.

Kiapo hili kimetolewa na Hakimu Mfawidhi Mahakama ya Mwanzo Temeke.

And the second document was deponed by Fatuma Omari Nyamgunda. She stated;

**HATI YA KIAPO
MAKABIDHIANO YA NYUMBA ILIYOPO
MBAGALA KIBONDEMAJI DAR ES SALAAM**

Mimi Fatuma Omari Nyamgunda, kabila Mndengereko, umri 40, makao Temeke, Mtaa wa Kitomondo, Dini – Islam. Nathibitisha kwa kiapo kuwa Nyumba iliyotajwa hapo juu ni mali yangu, sina shirika na mtu yeyote.

Nami kwa hiari yangu nimeamua kuwapa nyumba hiyo watoto wa kaka yangu Salehe Hamza na Mfanyeje Hamza. Nao wamenipa Banda lao lililoko Mtaa wa Kitomondo Plot No. 129 Block I kutokana na wao kutokuwa na uwezo wa kuliendeleza banda hilo.

Hivyo, kuanzia sasa nyumba hiyo ni mali ya Mfanyeje Hamza na Salehe Hamza.

Natoa tamko hili mbele ya Maakama nikijua kuwa yote niliyosema hapo juu ni ukweli mtupu, lolote likitokea kinyume na kiapo hiki litakuwa jukumu langu.

After that, Fatuma constructed a modern house in a suit plot. At that time the late Tukae was still alive but she never claimed for the ownership of the suit plot.

From above, I have the following observations.

One, as the evidence indicated, the meeting sat in 1993, and the legalization of the exchange of the plots was done in 1995, which means that at the time, Tukae was still alive, but she did not claim ownership of the suit plot. DW3, the younger

Two, the documents were never objected to at the hearing, or their contents were not cross-examined. Thus, they were admitted without any qualification and taken to have been admitted by the opponent party as was held by the Court of Appeal in **Anna Moises Chissano vs. The Republic**, Criminal Appeal No. 273 of 2019(Tanzlii), it was held that;

"An accused is expected to challenge a witness's testimony by way of cross-examination or object to the tendering of a documentary or physical exhibit during the trial. Once certain

evidence goes into the record unchallenged, it is, in law, taken to have been admitted by the accused”.

Therefore, there was unchallenged evidence of how the suit plot “landed” into the ownership of the late Fatuma Omari Nyamgunda.

Based on the above findings, while sailing with the principle in **Paulina Samson Ndawavya vs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported), that;

“It is equally elementary that since the dispute was in the civil case, the standard of proof was on a balance of probabilities, which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.”

Based on the above rival testimonies, it is quite clear that the plaintiff fails to prove that he is the legal owner of the disputed property by virtue of the administratorship of the late Tukae Omari Salehe Nyamgunda estate. The evidence proved that the suit plot belonged to the late Fatuma Omar Nyamgunda and is now under the administration of Amina Omar Nyamgunda.

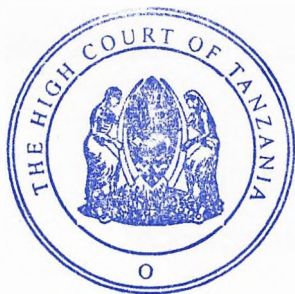
Before I conclude, I wish to comment on one issue quite briefly. At the hearing of the case, it was clear that after the death of the late Tukae Omar Nyamgunda on 30 July 1999, her daughter Fatuma O. Kapera was appointed as the administrator of estate by Mbagala Primary Court in Probate No. 288 of 2011. According to exhibit D8 (The decision of Mbagala Primary Court), she was appointed on 25 October 2011. That exhibit was not objected to its admission.

On the other hand, the plaintiff also tendered the letters of administration. That he was appointed as the administrator of the late Tukae Omari Nyamgunda by the High Court of Tanzania-Dar es Salaam vide Probate and Administration Cause No. 61 of 2019 (Exhibit P1). He was appointed on 8 December 2020.

In the record, there was nothing testified or tendered by the plaintiff on whether the administratrix of the first administrator, Fatuma O. Kapera, was revoked on nor before he applied for the administration. In the absence of such a revocation, it means there is a question regarding the plaintiff's locus standi to file this suit as the administrator of the estate of the late Tukae Omari Nyamgunda. On this, I shall end here since it was not framed as an issue, and it cannot change the outcome of this case.

In the final analysis, the plaintiff's evidence did not prove the claims on a balance of probabilities; the suit lacks merit; therefore, I dismiss this suit with costs.

I order accordingly.




K. D. MHINA
JUDGE
20/11/2023