

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 243 OF 2021

ANTONY MASERO MABOTO PLAINTIFF

VERSUS

STELLA PAUL HAKILI 1ST DEFENDANT

JOSEPHAT SIMON MAKONDA 2ND DEFENDANT

DABRI AUCTION MART COMPANY LTD 3RD DEFENDANT

JUDGMENT

Date of Last Order: 22.11.2022

Date of Judgment: 10.01.2023

A.Z. MGEYEKWA, J

At the centre of controversy between ANTONY MASERO MABOTO, the Plaintiff, and STELLA PAUL HAKILI, JOSEPHAT SIMON MAKONDA & DABRI AUCTION MART COMPANY LTD, the Defendants. The Plaintiff filed an amended Plaintiff on 28th April, 2022 and prays for Judgment and Decree against the Defendants as follows: -

- (i) *That, the Plaintiff is a lawful owner of the suit property.*

- (ii) *That, the 1st Defendant be ordered to hand over the Certificate of Title of the suit property to the Plaintiff.*
- (iii) *That, the Notice issued by the 3rd Defendant is illegal, ineffectual, and null and void.*
- (iv) *That, if this finds that at the time when the suit was purchased by the Plaintiff, the 1st Defendant was not a lawful owner of the suit property, this court to order the Plaintiff to be refunded his Tshs. 400,000,000/- plus interest at bank rate from the date of signing of the sale agreement to the date of final determination of this suit.*
- (v) *Interest on the Tshs 400,000,000/- at the rate of 7% from the date of Judgment until full and final payment.*
- (vi) *General damages are to be assessed by the court.*
- (vii) *Costs of this suit.*
- (viii) *Any other reliefs which this Honourable Court may deem fit to grant in favour of the Plaintiff.*

In response to the Plaint, on 14th June, 2022 the 1st Defendant filed an amended Written Statement of Defence disputing all the claims and put the Plaintiff in strict proof of his unfounded allegations. The 2nd and 3rd Defendants were served through summons and later through substitution of service, Mwananchi Newspaper dated 7th March, 2022. However, the

2nd and 3rd Defendants did not show appearance. Therefore this court granted the Plaintiff's Advocate prayer to proceed *ex parte* against them.

The facts, as can be deciphered from the pleadings and evidence on record go thus: the Plaintiff alleges to have purchased the suit property from Josephat Makonda, the 2nd Defendant. The suit property was ordinarily owned by the 1st Defendant as the legal representative of her late husband. Thus, the 2nd Defendant had obtained the suit property from the 1st Defendant by way of disposition in exchange for Plot No. 128/2C Block "F" which belonged to the 2nd Defendant to Plot No. 91 Bahari Beach that belonged to the 1st Defendant.

After such disposition between the 1st Defendant and the 2nd Defendant, the 2nd Defendant sold the suit property to the Plaintiff. The source of this dispute emerged after the 1st Defendant issued a Notice to the Plaintiff via the 3rd Defendant requiring him to vacate from the suit property and hand over the suit property to the 1st Defendant on the ground that the 2nd defendant had no good title to pass to the plaintiff. That was the genesis of this dispute.

At all the material time, the Plaintiff was represented by Mr. Richard Motey and Amon Rwiza, learned Advocates while the 1st Defendant had the legal service of Mr. ELisa Mndeme and Mr. Salmin Mwiri, learned Advocates.

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

- 1) *Whether the plaintiff legally purchased the suit premises Plot No. 91 situated at Bahari Beach Kinondoni Dar es Salaam.*
- 2) *Whether the 1st defendant and the 2nd defendant entered into a legal agreement for the disposition of a house on plot No. 128/C Block "F" for the exchange of plot No. 91 situated at Bahari Beach at Dar es Salaam.*
- 3) *Who is the rightful owner of the suit property/plot No. 91 Bahari Beach.*
- 4) *What relief are the parties entitled to.*

In what seemed to be a highly contested trial, the Plaintiff led evidence of four witnesses and the Defendants summoned two witnesses whereas the Court called one court witness.

The Plaintiffs case was founded on Mr. Antony Masero Maboto, who testified as **PW1**, Jacob Lucas (**PW2**), Zaria Said Utope who testified as **PW3**, and Anna Chota (**PW4**). In a bid to establish her defence case, the 1st Defendant paraded two witnesses; Mrs. Stela Paul Hakili (**DW1**) and Christabella Gasper Hakili who testified as **DW2**.

It is needful to mention that the following exhibits were adduced in support of the party's testimony. The Plaintiff's side tendered five (5) documentary exhibits; a Sale Agreement dated 6th July, 2017 between the 1st defendant and the 2nd Defendant (**Exh.P1**), a Sale Agreement dated 17.07.2017 between the 2nd Defendant and the Plaintiff (**Exh.P2**). A bank payment slips dated 17th July, 2017 (**Exh.P3 collectively**), An Application for filing a Power of Attorney dated 1st November, 2016 (**Exh.P4**), and Application for subtitle (**Exh.P5**).

On his side, the Defendant tendered one documentary exhibit to wit; an Original Certificate of Occupancy (**Exh.D1**).

Mr. Amon Rwiza, learned Advocate was the first one to kick the ball rolling leading PW1 to express the facts. PW1, started by stating that he purchased the suit property Plot No. 91 located at Bahari Beach Kinondoni Dar es salaam, from the 2nd defendant on 17th July, 2017 at the tune of Tshs. 400,000,000/=. To substantiate his testimony he tendered a Sale Agreement which was admitted and marked as exhibit P2.

He further stated that the plaintiff had done due diligence including conducting an official search, whereas the 2nd defendant called the 1st defendant to meet with the plaintiff and the 1st defendant assured the plaintiff to have sold the suit property to the 2nd defendant on 6th July,

2017. To substantiate his testimony PW1 tendered a certified copy of Sale Agreement (Exh.P1) between the 1st defendant and 2nd defendant was given.

PW1 testified that all the transaction and payments was deposited in the 2nd defendant's Bank account No. 23910000468 and 2290000337 both bearing the name of Josephat Simon Makonda (Exh. P3) whereas Tshs. 372,670,000/= was deposited into the 2nd defendant's Bank account on the same day of signing the Sale Agreement. PW1 stated that the remaining Tshs. 27,330,000/= was paid in cash to the 2nd defendant. PW1 testified that it is the 1st defendant who was showing the boundaries of the suit property to the plaintiff. He went on to testify that the 1st defendant vacated the suit land by removing her guard and allow the plaintiff to take possession. PW1 testified that he occupied the suit property from 2017 to date without any interference.

PW1 further testified to the effect that the 1st defendant had assured the plaintiff to have sold the suit property to the 2nd defendant and that the Certificate of Title was in process. He further stated that in 2021 the 1st defendant told PW1 that she had a misunderstanding with the 2nd defendant and that the 2nd defendant was nowhere. DW1 asked the plaintiff to pay her Tshs. 15,000,000/= for him to continue enjoying the suit property because.

During cross-examination, PW1 testified that the disposition between the 1st defendant and the 2nd defendant as per exhibit P1 was by way of exchanging Plots No. 128C Block "F" with Plot No. 91 situated at Bahari Beach. PW2 Jacob Lucas was introduced as the 1st Defendant's guardsman. He stated that formerly was hired by the 1st Defendant as a caretaker of Plot No. 91 situated at Bahari Beach in 2015, whereas in July 2017, the 1st Defendant informed him to vacate the suit land because the suit property had been sold to the Plaintiff. PW2 testified to the effect that the suit property was placed in the hands of the plaintiff whereas the plaintiff hired his own guard to the suit property different from PW2.

Zaria Said (PW3), a Street leader of Bahari Beach Area. She testified to the effect that the 1st Defendant had a land dispute over the suit plot and the 1st Defendant emerged as a winner and she was instructed to witness the handing over of the suit plot to the 1st Defendant. PW3 testified to the effect that the 1st Defendant requested for a caretaker of the suit property, and she managed to find PW2 who was employed to guard the suit property.

PW2 further, stated that in 2017, the 1st defendant asked PW2 to stop working in the suit plot because she sold the suit land to the plaintiff and that the 1st Defendant was no longer the owner of the suit property. PW2 testified that the Plaintiff is the owner of the suit land. She further testified

that the sale process of the suit plot was conducted on the suit land in the presence of the 1st Defendant, 2nd Defendant, Plaintiff, and three Street members including PW3.

Anna Chota, testified as PW4. She stated that she is working with the Ministry for Land & Housing Settlement. PW4 testified to the effect that the Plot in dispute at the time when the 2nd Defendant disposed of Plot No. 128/2C Block "F" to the 1st Defendant was in the name of One Fatma Mwilima and not the 2nd Defendant. PW4 testified that the 2nd Defendant obtained a Power of Attorney from Fatma Mwilimato to act on her behalf. PW4 said that according to their records, Plot No. 128/2C is currently owned under the Power of Attorney of the 2nd Defendant, the same is still valid and has no any encumbrances.

During cross-examination, PW4 testified that the status in disposition is of great importance and that the heir's consent before disposition was important. She testified that failure to state the capacity and proceed with the transfer does not nullify the sale.

On the defence side, Stella Paul Hakili (DW1) testified to the effect that the suit land belonged to her late husband who died in 2008. She testified that after two weeks the 1st Defendant was appointed an Administratrix of the Estate of her late husband.

DW1 testified to the effect that there was an agreement between her and the 2nd Defendant for disposition of the suit property by way of exchange of Plots No. 128/2C Block "F" and Plot No. 91 located at Bahari Beach. DW1 testified that the mode of payment was to the effect that the 1st defendant to take Plot No 128/2C Block "F" at the value of Tshs. 300,000,000/- and later he had to pay additional money to a tune of Tshs. 140,000,000/- totalling Tshs. 440,000,000/- in exchange of **Plot No. 91** situated at Bahari Beach. She further stated upon such payment DW1 had to hand over the Certificate of Title No. 165118 to the 2nd Defendant. DW1 stated that the original Certificate of Title was issued on 24.07.2017 in the name of the 1st defendant. She further stated that the disposition and all transactions were incorrect because **DW1** had not sought the consent of her children, the beneficiaries of the suit property, and secondly, in their Sale Agreement (Exh.P1) dated **06.07.2022** neither of the two had stated the legal status in performing the contract, hence, both had no capacity to enter into a contract because she was selling a property of her late husband without consent of the beneficiaries and that the 2nd Defendant was selling the plot that was not registered in his name and without stating the legal status. DW1 went on to testify that the 2nd Defendant was required to refund her but he went missing and he is nowhere to be found.

During cross-examination, DW1 stated that she wanted to return Tshs. 100,000,000/- to the 2nd Defendant and the 2nd Defendant was supposed to return her **Plot No. 91 situated at Bahari Beach**. DW1 testified that she was not aware if the beneficiaries' consent was of great importance.

Christabella Gasper Hakili testified as DW2. She stated that the 1st Defendant is her biological mother and DW1 did not involve her in the disposition of the suit property as one of the beneficiaries because the suit land formerly belonged to the late father.

Janeth Josephat Makonda (CW1) testified that the 2nd Defendant is her father and that she once saw the Plaintiff in her father's office demanding a Certificate of Title from her father. CW1 testified that her father is missing for some time. CW1 testified that they did not report to the police station that her father is missing. She further testified that the 2nd Defendant is owning one building and several frames which are rented and the same is operating as a Church. CW1 further testified that on the last communication with her father (2nd defendant) had told her that he is doing fine and told her not to worry about him or look for him.

After a careful consideration of the evidence of the witnesses and court records it is now an invitation to resolve the raised issues for determination as follows; -

- 1) *Whether the plaintiff legally purchased the suit premises Plot No. 91 situated at Bahari Beach Kinondoni Dar es Salaam.*
- 2) *Whether the 1st Defendant and the 2nd Defendant entered into a legal agreement for the disposition of a house on plot No. 128/C Block "F" for the exchange of Plot No. 91 situated at Bahari Beach at Dar es Salaam.*
- 3) *Who is the rightful owner of the suit property/plot No. 91 Bahari Beach.*
- 4) *What relief are the parties entitled to.*

By the order of this court, parties were ordered to file final submissions on 6th December, 2022 whereby both parties' counsels complied with the court order effectually, and the final submissions from both parties were extremely considered in articulating this Judgment.

In the course of determining this case, I will be guided by the principle set forth 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."

See also the cases of **Charles Richard Kombe v Evarani Mtungi and Two Others**, Civil Appeal No. 38 of 2012; and **Barclays Bank (T) Limited v Jacob Muro**, Civil Appeal No. 357 of 2019 (both unreported).

From the foregoing, let me now confront the issues framed for the determination of the present dispute between the parties. I have opted to

combine the first and third issues and argue them together because they are intertwined. Except for the second and fourth issues which will be argued separately.

Starting with the second issue; *whether the 1st and the 2nd Defendants entered into a legal agreement for the disposition of a house on Plot No. 128/C Block "F" for the exchange of Plot No. 91 situated at Bahari Beach at Dar es Salaam.* In his testimony, PW1 testified to the effect that Josephat Makonda, the 2nd Defendant bought a piece of land from Stella Paul Hakili, the 1st Defendant. To substantiate his testimony he tendered a Sale Agreement (Exh.P1).

DW1 in her testimony testified to the effect that in 2017, she entered into an agreement for disposition of the suit property, Plot No. 91 Bahari Beach with the 2nd Defendant in exchange for Plot No. 128/2C. DW1 stated that the suit land title was in the name of Gasper Hakili, her late husband. Going through her testimony, it is clear that DW1 admitted that there was a Sale Agreement regarding Plot No. 91 of Bahari Beach between her and the 2nd Defendant. That means the 1st and 2nd Defendants entered into a Sale Agreement to sell the suit land in exchange for Plot No. 128/C Block 'F'.

DW1 also testified to the effect that she is aware that the 2nd Defendant sold Plot No. 91 but she did not know the buyer. DW1 admitted that she

told her guardsman to vacate the suit land because there was a new buyer of the suit land. She stated that Anthony Maboto has bought the suit land and he planned to place his guardsman into the suit land.

It is my considered view that as long as DW1 admits to having freely signed the said Sale Agreement (Exh.P1) with the 2nd Defendant for the disposition of the suit property, Plot No. 128/2C Block "F" for the exchange of Plot No. 91 at Bahari Beach, same proves that the 2nd Defendant had a good title to pass to the Plaintiff. Therefore, it goes without saying that both parties were bound by legal terms and conditions stipulated in the Sale Agreement (Exh.P1) and none of them is allowed to repudiate the terms and conditions. See Section 123 of the law of Evidence Act, Cap.6 [R.E. 2019].

'123. When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.'

In the 1st Defendant's final submissions specifically on page 13, DW1 admits to having entered into an agreement. However, DW1 claims that she entered into that agreement with no capacity. For ease of reference,

I reproduce part of the submission made by the 1st Defendant's counsel on page 12 paragraph 7 that:-

'...plot No. 91 Bahari Beach was the property of the late Gasper Hakili. The said property has been transacted illegally by people around it but with no capacity, without the beneficiaries' consent and involvement, without representative registration, and any lawful consideration as the consideration involved was not the property of the 2nd Defendant and also the said conditions under the agreement was never met by the parties under Exhibit P1.

DW1, in her testimony, testified to the effect that she did not follow proper procedure and failed to seek the consent of his late husband's beneficiaries hence she had no capacity to enter into the contract. It is my considered view that since Stella Hakili (DW1) was appointed as an administratrix of the estates of the late Gasper Paul Hakili, then she had capacity to deal with the property of the deceased in a manner that she thinks fit subject to the law. See 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 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.”

I am also persuaded by the holding of this Court in the famous case of **Ibrahim Kusaga v Emmanuel Mwita** [1986) TLR 26 HC, this Court held that: -

“...there may be cases where the property of the deceased person may be in dispute. In such cases, all those interested in the determination of the dispute or establishing ownership may institute proceedings against the administrator or the administrator may sue to establish the claim of deceased's property.”

Guided by the above holdings of the Court of Appeal of Tanzania, I find that DW1 had the mandate to enter into a Sale Agreement with the 2nd defendant. Therefore, DW1 allegations cannot hold water because she had a mandate to sell the deceased assets without obtaining the consent of her children. Consequently, the Sale Agreement (Exh.P1) between the 1st and 2nd Defendants was legal.

In addition, the evidence on record reveals that the Ministry for Land and Housing Settlement issued a new subtitle with registration No. 1853301

(Exh P5) which still exists. PW4 testified to the effect that the current status regarding Plot No. 91 Bahari Beach as per the Certificate of Title shows is in the hands of Fatma Mwilima and the same is under the Power of Attorney of Josephat Makonda. PW4 testified to the effect that the new subtitle is not revoked and there are no any encumbrances that mean Josephat Makonda was in a position to sell the suit plot to the plaintiff. Therefore, I do differ with the findings of the 1st Defendant's counsel that PW1 is a stranger to the Sale Agreement (Exh.P1) hence, he had any claim against Stella Hakili.

From the above findings, I hold that the 1st and 2nd Defendants had entered into a legal agreement for the disposition of a house on Plot No. 128/2C Block "F" for the exchange of Plot No. 91 at Bahari Beach.

Next for consideration are the first and second issues because they are intertwined. The 1st issue is *whether the plaintiff legally purchased the suit premises Plot No. 91 situated at Bahari Beach Kinondoni Dar es Salaam*. And the third issue is *who is the rightful owner of the suit land*.

The analyses of this issue reveal that the parties herein lock horns on who is the lawful owner of the suit property. In a chronological account of the ownership of the property, the Plaintiff presented that he bought the suit land from the 2nd Defendant. To substantiate his testimony he tendered a Sale Agreement (Exh.P2) between the Plaintiff and 2nd

Defendant. Reading the Sale Agreement, it reveals that the 2nd Defendant sold the suit land to the Plaintiff on 17th July, 2017.

PW2 and PW3 in their testimonies testified to the effect that they witnessed the handing over of the suit property to the Plaintiff and DW1 removed her own guard to pave way for the Plaintiff to occupy suit land; Plot No. 91 located at Bahari Beach from 2017. This piece of evidence proves that the Plaintiff legally purchased the suit premises from the 2nd Defendant. The same was cemented by the Court Witness (CW) who testified to the effect that he saw the Plaintiff demanding a Certificate of Title from the 2nd Defendant who is the biological father. As pointed out earlier, the Plaintiff presented; that he is the lawful owner because he has bought the suit land from the 2nd Defendant. To substantiate his testimony, PW1 tendered a Sale Agreement (Exh.P2).

The evidence on record reveals that the 1st and the 2nd Defendants entered into a Sale Agreement and the 2nd Defendant having obtained good title from the 1st Defendant decided to sell the suit land, Plot No. 91 situated at Bahari Beach to the Plaintiff. Therefore the transfer was proper and the Plaintiff obtained good title from the 2nd defendant. To be precise the Plaintiff is the lawful owner of the suit property.

DW1 is trying to recover the suit land which she sold to the 2nd Defendant, thus, I had to go through the entire evidence to find out if the 1st

Defendant's claims can be entertained by this Court. The 1st Defendant is seeking the 2nd Defendant to refund him back and recover her suit land. DW1 claims cannot be entertained by this Court because the 1st Defendant did not file a counterclaim against the 2nd Defendant. In case the 1st Defendant has any claims against the 2nd Defendant then she can lodge a suit against him.

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 Plaintiff is entitled to some of the reliefs claimed because he has established and proved his ownership of the suit plot. Therefore, in my considered view, I find that the Plaintiff is entitled to reliefs prayed in paragraphs (i), (ii), and (iii), save for reliefs prayed under paragraphs (iv), (v), (vi), (vii) and (viii).

In the upshot, the case is decided in favour of the Plaintiff, and I proceed to declare and decree as follows:-

- 1) The Plaintiff is declared a lawful owner of the suit land, Plot No. 91 located at Bahari Beach.
- 2) The 1st Defendant is ordered to hand over Plot No. 91 located at Bahari Beach to the Plaintiff.
- 3) The Notice issued by the 1st Defendant to the 3rd Defendant is illegal and null and void.

4) No costs to the suit.

Order accordingly.

Dated at Dar es Salaam this date 13th January, 2023.





A.Z.MGEYEKWA

JUDGE

13.01.2023

Judgment delivered on 13th January, 2023 in the presence of Mr. Amon
Rwiza and Richard Motey, learned counsels for the Plaintiff and Mr. Elisa
Mndeme, learned counsel for the 1st Defendant.




A.Z.MGEYEKWA

JUDGE

13.01.2023

Right to appeal fully explained.