

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

AT DAR ES SALAAM

LAND CASE NO.287 OF 2022

**YESSEH K. WAHYUNGI (Suing as Administrator of the Estate of
the late Alexander Kaluwa Wahyungi, also known as Alexander
Adam Wahyungi also known as**

Alexander Kaluwa Adam)..... PLAINTIF

VERSUS

M/S MUHAMMADI LIMITED..... 1ST DEFENDANT

THE COMMISSIONER FOR LANDS..... 2ND DEFENDANT

ILALA MUNICIPAL COUNCIL

(DAR ES SALAAM CITY COUNCIL).....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

5th & 25th March, 2024

L. HEMED, J.

YESSEH K. WAHYUNGI is the Plaintiff in the instant matter suing in the capacity of administrator of the estate of the late Alexander Kaluwa Wahyungi @ Alexander Adam Wahyungi @ Alexander Kaluwa Adam whose history ended on 05th August 2019. He knocked the gates of this Court with a claim that Plot No.505 ILALA Ex-daya Estate Bungoni, within Ilala



Municipality is the one previously registered as Plot No.504A Ex-Daya Estate in Bungoni Ilala Municipal Council and which belonged to his deceased father. He further alleged that the changes in the designation of the plot from Plot No.504A Ilala, Exdaya Estate Bungoni Ilala Municipality to Plot No.505 Ilala Exdaya Estate Bungoni Ilala Municipality and allocation of it to the 1st Defendant was illegal for having created double allocation.

The Plaintiff is thus praying for Judgment and Decree on the following reliefs:-

“

- (i) A declaration that Plot No.505 Ex-daya Estate, Bungoni, Ilala is the same as Plot No.504A which formally belonged to the deceased father of the Plaintiff.*
- (ii) A declaration that the deceased father of the Plaintiff was the lawful owner of Plot No.504A which was changed to 505 by the Defendants.*
- (iii) A declaration that the act of changing Plot No.504 A to 505 without notifying and involving the father of the Plaintiff who was the owner of the plot was illegal and unjust.*
- (iv) A declaration that having changed the plot designation from plot No.504A to 505 then to allocate the same to*



the 1st Defendant was illegal as the rights of the deceased father of the Plaintiff was still in existence(Not yet revoked) and that the new allocation was done without notice to the deceased father of the Plaintiff.

- (v) A declaration that the allocation of the same land to the 1st Defendant while by the time occupied by the deceased father of the plaintiff was a double allocation and that the father of the Plaintiff being the first person to be allocated by the plot, he remains the lawful owner.*
- (vi) A declaration that the whole process of changing plot No.504A to 505 and then allocating the same to the 1st Defendant did not follow procedures and hence was null and void ab-initio.*
- (vii) An order of payment of Tshs 100,000,000/=being mesne profit as a result of unlawfully authorised use of the Plaintiff's father land so that to cause loss of business opportunities.*
- (viii) An order of evicting the 1st Defendant from occupying the Plot in question and all person using the land for the direction or instruction of any of the defendants.*
- (ix) An order of demolishing all structures constructed on the plot at the defendant's costs.*
- (x) A permanent injunction against the defendants their agents and/or employees to interfere with the Plaintiffs land in any way.*



- (xi) General damages as may be assessed by this court.*
- (xii) Interest of any decretal sum at court rate of 12% per annum.*
- (xiii) Cost of this suit."*

The 1st Defendant **M/S MUHAMMADI LIMITED**, could neither file written statement of defence nor enter appearance despite being duly served. Only the **COMMISSIONER FOR LANDS, ILALA MUNICIPAL COUNCIL** and **THE ATTORNEY GENERAL** who managed to file the joint written statement of defence disputing all the claims. At all the material time, the Plaintiff was represented by **Mr. Isaac Tasinga**, learned advocate while the 2nd, 3rd and 4th defendants duly enjoyed the service of **Ms. Joyce Yonaz**, learned State Attorney.

Issues for determination as were framed during final pre-trial conference were as follows:

1. Whether Plot No.505 is the same as Plot No.504A Ex-daya Estate.
2. Whether the suit landed property is part of the estate of **Alexander Kaluwa Wahyungi**.
3. What reliefs are the parties entitled to.

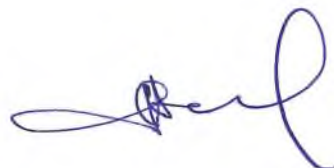


It is trite law that he who alleges must prove. The said principle is applicable in our jurisdiction through the statute governing evidence. Section 110(1) & (2) of the Evidence Act, [Cap.6.RE 2019] embraces it by providing thus:-

*"110. -(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts **must prove that those facts exist.***

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." [Emphasis added'].

It should be noted that, the main complaint of the Plaintiff is that the defendants changed part of his landed property, that is Plot No. 504A, Ex-Daya Estate Bungoni Ilala Municipality to Plot No.505 Ex-Daya Estate without his knowledge and allocated the same to the 1st Defendant. From that end the 1st issue is on '***whether Plot No.505 is the same as Plot No.504A Ex-daya Estate.***' It was the duty of the plaintiff who alleged that Plot



No.504A is the same as Plot No.505 to prove as per section 110 of the Evidence Act (*supra*). The question is whether evidence adduced by the Plaintiff substantiates the allegation.

The Plaintiff's case had two witnesses, **Yesseh Wahyung**, the Plaintiff who testified as PW1 and **Cherd Chamtuni**, one of the founders of Azania Soap Garment and testified as PW2. The following 11 exhibits were tendered for the plaintiff's case:-

1. Letters of appointment as administrator of estate issued to YESSEH WAHYUNGI by Primary Court for Kimara, in Probate Cause No.273/2019 (exhibit P1);
2. Application for official search for Plot No.505 – Title No.186208/36 dated 18th August 2023 (exhibit P2);
3. A letter of the Commissioner for Lands to Azania Soap Garment Co-operative Society on Approval of the Application for a long term Right of Occupancy, date 15th November, 1976 and loss reports Nos. DAR/BUG/RB/2449225/2023 & DAR/BUG/RB/244926/2023 (exhibit P3)



4. A letter from the Ministry of Lands, Water, Housing and Urban Development, to Alexander Kiluwa Wahyungi, approving sale of Plot No.504 & 504A Ex-Daya Estate and Loss Report DAR/BUG/RB/244927/2023 (Exhibit P4);
5. Reminder Note to Alexander K Wahyungi for payment of land rent for Plot. No 504 & 504A B Ex-Daya Estate and Loss Report No. DAR/BUG/RB/244928/2023 (exhibit P-5);
6. A letter of the Dar es Salaam City Commission to Iqbal Ebrahim dated 29th October 1999 informing him that the letter of offer issued to him on Plots No.504 & 504A Ex-Daya was null and void and Loss Report No. RB/BUG/244931/2023 (Exhibit P6)';
7. A letter dated 07th December 2009 from the Commissioner for Lands to Director, Ilala Municipal Council directing him to grant right of occupancy to Alexander Kaluwa Wahyungi and the Loss Report No.DAR/BUG/RB/244935/2023 (Exhibit P7);



8. A letter from the Ministry of Lands to Land Officer – Dar Es Salaam informing him that the right of occupancy of Alexander K.Wahyungi, over Plots No.504 & 504A Ex-Daya is recognized by the Ministry dated 31st March 1998 and Loss Report No.DAR/BUG/RB/244930/2023 (exhibit P8);
9. Muhimbili National Hospital -Medical Report for Alexander Wayungi dated 13th May 2014 together with a Loss Report No.DAR/BUG/RB/244936/2023 (Exhibit P9);
10. Notice of intention to sue the Government dated 30th June 2023, (Exhibit P10); and
11. A letter to the Commissioner for Lands by ASOCO dated 12th January 2000, introducing Alexander Wahyungi to have purchased Plot No.504 & 504A Ex-daya- Ilala (Exhibit P11).

On their part, the 2nd, 3rd and 4th defendants called two (2) witnesses who were, **Ramadhan Seleman Chamwiti**, the land surveyor who testified as DW1 and one **Kajesa Minga**, the land officer who adduced



evidence as DW2. Only one (1) exhibit, that is, the Revocation Instrument of Plot No. 504 & 504A, Ex-Daya Estate Ilala Area of 19th July 2004 was tendered and admitted as exhibit D1.

In an attempt to prove his case, the Plaintiff who testified as PW1 informed the Court to be administrator of the estate of the late Alexander Kaluwa Wahyungi. He tendered the letter of appointment by the Primary Court of Kimara (exhibit P1). He continued to narrate that his late father, whose estate is under his administration, acquired Plot No.504 & 504A Ex-Daya Estate by sale from Azania Soap Garment Co-operative society in 1986. Exhibits P4, P5, P7 and P8 were tendered to prove on how Plots No.504 & 504A Ex-Daya Estate were acquired and owned by the late Alexander Wahyungi.

The testimony of PW1 with regard to acquisition of Plot No. 504 & 504A Ex-Daya Estate by the late Alexander Wahyungi was supported by PW2, the person who was among the founding members of Azania Soap Garment co-operative Society. Such evidence was further confirmed by DW2, the Land Officer from the office of the Commissioner for Lands. From evidence on record, it is not in dispute that the late Alexander Wahyungi

bought Plot No.504 & 504A Ex-Daya Estate from Azania Soap Garment Co-operative Society.

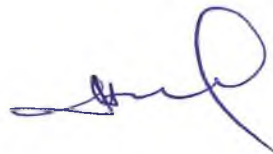
Nevertheless, to prove that Plot No.504A was changed to Plot No. 505 and re-allocated to the 1st Defendant, the Plaintiff relied solely on exhibit P2 which included the **Application form for official search, payment receipt for official search** and a **report of official search for Plot No.505 Ex-daya Estate**.

I have noted from the application form for official search that, on 17th August 2023, **Mr. Isaac Nassor Tasinga**, specifically lodged an application to the Registrar of Titles for official search of Title No.186208/36 for Plot No.505, Ex-Daya Estate and not for status of Plot No.504A. The report came out stating that Plot No. 505 Ex-Daya Estate Ilala is owned by **MUHAMMAD LIMITED** of P.O.Box 1762 Dar es Salaam. It is my firm view that since the application was specifically lodged for purpose of knowing the status of Plot No.505 Ex-Daya Estate-Ilala, then, exhibit P2 cannot be said to be a proof for change from Plot No.504A to 505. I am holding so because, exhibit P2 (the official search report) does not state the history of such plot. In other words, it does not tell if Plot No.505 changed from Plot No.504A Ex-Daya Estate, Ilala.



The matter at hand involves a surveyed and registered piece of land. Therefore, any allegation concerning any change in the survey plan has to be proved by a witness who possesses knowledge in land survey and mapping, in this case a land surveyor. Where there is a need to prove the history or change of ownership of a surveyed and registered land, the Registrar of Titles or a person who has knowledge in matters concerning conveyancing and registration of land becomes a key witness.

The Plaintiff opted not to call such crucial witnesses to tell the court about the history of Plot No.505 Ex-Daya Estate (if any). The land surveyor, for example, if would have been paraded to testify, he would have told the court if there was any change in survey plan from the one which created Plot No.504A Ex-Daya Estate to the one that established the suit plot No.505 Ex-Daya Estate. In my firm opinion, witnesses to testify on the history of the suit plot were key in building the plaintiff's case. The plaintiff has not disclosed the reasons for not calling such key witnesses. It is indeed not known why the Plaintiff failed to call such important witnesses. In this regard, I am inspired by what is written in a book **Law of Evidence**, 17th Edition Vol.III by Sir John Wood-roffe and Syed Amir Alis, Butterworth, New Delhi at page 4625 on the failure by a party to produce material witness:




"Where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a first account of the matters of controversy and throw light on them and who can refute all allegations of the other side, it is legitimate to draw an adverse inference against the party who has not produced such a principal witness."

The above proposition is reflected in **Hemed Saidi v. Mohamedi Mbilu** [1984] T.L.R 113, where the Court held thus;

"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 witness were called they would have given evidence contrary to his interests"

From the foregoing, it is trite that failure to call key witnesses entitles the Court to draw adverse inference that if such witnesses would have called, they would have told a different story detrimental to the plaintiff.

Evidence on records reveals that, the 2nd, 3rd and 4th defendants paraded the surveyor who adduced evidence as DW1. His testimony was such that Plot No.504A Ex-Daya Estate is not the same as Plot No.505 Ex-Daya Estate. In deed the surveyor who ought to have called by the Plaintiff testified a different story to what the Plaintiff was claiming.



In his final submissions to support the plaintiff's case, Mr. Tasinga, advocate stated that the defendants have failed to denounce in their pleadings that Plot No 504A is not the same as Plot No.505. in his opinion such pleading bind them than what is stated in the defence evidence. I am at one with Mr. Tasinga that parties are bound by their own pleadings and in fact they are not required to depart from them as held by the court in various cases including in the case of **Salim Said Mtomeka v Mohamed Abdallah Mohamed**, Civil Appeal No.149 of 2019. However, upon perusal of the written statement of defence of the 2nd, 3rd, and 4th defendants, I realized that the denied the Plaintiff's allegation that Plot No.505 Ex-Daya Estate is the same as Plot No.504A Ex-Daya Estate. The 2nd, 3rd and 4th defendants pleaded that the two plots were not the same.

The denial by the defendants burdened, the Plaintiff has the duty to prove his allegations of Plot No.504A Ex-Daya Estate to be the same as Plot No.505 Ex-Daya Estate. This is because in civil cases, it is never the duty of defendant to prove facts of denial when the plaintiff fails to prove his claims. In other words, the weakness of the defendants' evidence cannot discharge the plaintiff from his duty of proving his case. This position was also highlighted by the Court of Appeal of Tanzania in **Paulina Samson**



Ndawavya v. Theresia Thomasi Madaha, Civil Appeal No.45 of 2017,
that:-

"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof...until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..." (Emphasis added)

In the instant case the failure of the Plaintiff to discharge his burden of proving that Plot No.505 Ex-Daya Estate is the same as Plot No.504A Ex-Daya Estate, cannot be shifted to the defendants who denied the said claim. From the foregoing, I think it is apt to conclude the 1st issue in the negative that Plots No.504A and 505 Ex-Daya Estate are not the same.

Let me now turn to the 2nd issue that '***whether the suit landed property is part of the estate of the late Alexander Kaluwa***

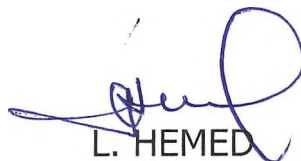


Wahyungi'. In the instant case, the suit property is Plot No.505 Ex-Daya Estate that the Plaintiff has failed to establish that is the same as Plot No.504A Ex-Daya Estate. This being the case, the 2nd issue has to be answered in the negative that the suit property is not part of the estate of Alexander Kaluwa Wahyungi.

With regard to the last issue on the reliefs parties are entitled to, I am of the firm view that, since the plaintiff has failed to prove that Plot No.504A Ex-Daya Estate has been changed to Plot No.505 Ex-Daya Estate, then he deserves nothing out of the reliefs claimed. In fact, I have ventured across all evidence adduced by the plaintiff and I could not find none out of the 13 reliefs claimed to have been proved. I am persuaded to find that the only remedy available to the plaintiff is dismissal of the suit for want of merits.

In the upshot, I dismiss the entire suit for want of merits. Taking into account of the nature of parties to this suit, I order each party to bear its own costs. Order accordingly.

DATED at **DAR ES SALAAM** this 25th March 2024.



L. HEMED

JUDGE

