

TANZANIA / JUDGMENT

ally musa mgulu and another vs peter peter junior and 3 others 2022 tzhc 12616 31 august 202

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TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 213 OF 2020 ALLY MUSA

MGULU.....1ST PLAINTIFF OMARY SHABANI
RAMADHANI.....2ND PLAINTIFF VERSUS PETER PETER
JUNIOR.....1ST DEFENDANT SAMWELI WILLIAM
KILOBA.....2ND DEFENDANT PETER PAULO
MARO.....3RD DEFENDANT WILLHEM
ERIO.....4TH DEFENDANT

JUDGMENT

12th July & 31st August 2022 F. H. MAHIMBALI, J. The two plaintiffs and four defendants in this case are in high contest of ownership of land measuring 18 acres located at Mapinga Ward, Kibosha harmlet in Bagamoyo District Council. Whereas the first plaintiff claims ownership of the said suit land after he had purchased it from Hamisi Selemani Kingaru as 1 per sale agreement dated 6th April, 1993, the second plaintiff claims 2.5. acres he purchased from the first plaintiff out of 18 acres the first plaintiff purchased from Hamisi Selemani Kingaru. To their surprise, sometimes in 2019 the plaintiffs noted that the said land (18 acres) owned by them had been invaded by the defendants each one claiming ownership of it. The Mapinga village council failed to solve the dispute, thus the institution of the current suit claiming that they are lawful owners of the suit land. They are jointly claiming for the following court's orders:

- i) That the defendants be declared trespassers of the suit premises. ii) Order of vacant possession against all the defendants from trespassing the plaintiffs' landed property. iii) General damage iv) Costs of the suit.
- v) Any other relief (s) this honourable court deems fit and just to grant. 2 On other hand, each defendant (save 4 th defendant), claims ownership of the suit land. They dispute the claim that the plaintiffs if ever owned the said alleged land as claimed. To counter the plaintiff's claims the 1 st defendant Peter Peter Junior claims that the suit land as belonging to him

after he had purchased it in 1994 from one Juma Kivurugo who by then had the best title of it by adverse possession prior to 1994 when the said Peter Peter Junior claimed to have purchased it at a price of 2,500,000/= and paid village fees of 250,000/=. After the said purchase, he planted both seasonal as well as permanent crops such as Cassava, Tick trees – timber, Cashew nut trees and Mango trees. That the first defendant has been in possession of the said land from 1994 to date and that by 2008 he sold part of his land (8 acres) to Mr. Wilhem Erio (4 th defendant) and remained with 17 acres. That sometimes in 2019, he came to realise that the said suit land is involved into a suit dispute at DLHT at Kibaha between the 3 rd and 2nd defendants. He being interested of it, he applied to be joined as a party to it where eventually these plaintiffs instituted this current case over the same land, thus stopping the case filed at the DLHT Kibaha. He thus disputed the prayers by the plaintiffs 3 (paragraph 10 (i) – (vi) of the plaint as baseless, and that the plaintiffs’ claim be dismissed with costs. The claims of the first defendant are backed up by his witness DW2 and DW3 but also collaborated by the testimony of Mr. Wilhem Erio (4 th defendant) who claimed to have acquired ownership of 8 acres from Mr. Peter Peter Junior but that himself had already sold it to another person who is not a party to this case. Interestingly, the second defendant while resisting the claims by the plaintiffs, supports the testimony of the 1 st defendant as being the rightful owner of the disputed land as he borders with his land. He contended that as Juma Kivurugo (a brother to Omari Kivurugo) sold his land to the first defendant, the said Juma Kivurugo who was neighbour of Jungu Juma in which the latter sold his land to him (2 nd defendant). Thus, the 2nd defendant borders land with the 1 st defendant but at the same time he (2nd defendant) has a land dispute against the 3rd defendant at DLHT at Kibaha. On his part, the third defendant Peter Paulo Maro (who defaulted appearance during the hearing of the case), in his WSD claims that he represented his deceased father Paulo Steven Maro who had already died and claimed that the land 4 owned by his father was surveyed and legally allocated to him in 2006 by appropriate land authority and has certificate of Title No 59322. It is his contention that as per this proof, there is good title of ownership by the 3 rd defendant against the alleged claims by the plaintiffs. He prayed that the plaintiffs’ claims be dismissed as being baseless. In other words, whereas the plaintiffs’ claims of ownership of the said land dates back from 1993, the 1 st defendant claims ownership of the same land from 1994. The second defendant on the other hand claims ownership from 1992. These three (1 st plaintiff, 1st defendant and 2nd defendant) all claim to obtain the said land by purchase from the indigenous people. As per contest of the parties in the suit, two issues were framed in order to determine the rights of the parties:

- i) Who is the lawful owner of the disputed plot. ii) What reliefs are the parties entitled to. The legal principle is, he who alleges must prove. The standard of proof, this being a category of civil cases is on balance of probabilities. The issue now is whether the plaintiffs 5 have established ownership of the said suit land, them being claimants. As highlighted above in the introduction, the 1 st plaintiff claims that he obtained the said suit land from one Hamisi Selemani Kinguru. Unfortunately, the said Kinguru didn’t testify on allegation that he is dead. What then material evidence is in record that entitle the plaintiffs as owners of the

suit land. What is gathered from testimony of PW1 is that he purchased the claimed suit land from Hamis Selemani Kingaru as original owner. That was in 1993. PW2 and PW6 stated that they were witnesses of that transaction. A similar testimony is stated by PW3 who says he was VEO of Mapinga village and that he witnessed the said sale and it was him who prepared the said sale agreement. However, PW4's testimony is to the essence that he just knew Mzee Hamisi Selemani Kingalu as famous person at Mapinga. He knew him from his Youth. However, he never witnessed about the sale transaction between the first plaintiff and the said Hamis Selemani Kingalu as claimed. He just heard about the dispute here in court. 6 On the part of PW5, had nothing material to offer on the issue of ownership of the said land to the first plaintiff but only the fact that he made coram to the meeting in which Mapinga village council had met to discuss the plaintiff's request of surveying of his land in order to get certificate of title. Therefore, the material evidence to support the 1 st plaintiff's claims is backed up by the evidence of PW2, PW3 and PW6 as eye witnesses of the said sale. However, this evidence faced an attack by the defense side as there was no original document tendered evidencing the said transaction. The witnesses tried to tender incomplete secondary evidence as missing other pages (relevant part of the sale contract). When original documents were pressed to be produced, neither PW1 himself was ready to tender any nor any official from Mapinga village council office nor any witness to the sale. Assuming that it got lost or misplaced, again the issue of consideration is whether the alleged invaded land by the defendants is the same purchased by the 1 st plaintiff from Mr. Hamisi Selemani Kingaru. When PW2 (Mrisho Ramadhani) was being cross examined by the 3 rd defendant, he is quoted to have stated he bought the said land in 1983. He started 7 construction in 2020. He donated a total of 10 acres to his family members and thus remained only with 8 acres. If this evidence is true, first it is contradictory with his pleadings as he claimed that out of 18 acres, he sold 2.5 acres to the 2 nd defendant. Out of the six witnesses for the plaintiffs neither the 2nd plaintiff himself testified for that transaction nor any witness said for that subsequent sale to the 2nd plaintiff. The relevancy testimony of PW1 is then deficient of any legal value for reliance. If he started construction in 2020, donated 10 acres to his family members, sold 2.5 acres to the second plaintiff, how come that he still claims invasion of 18 acres. Which then are these 18 acres he is claiming about. What can be all gathered is this, the plaintiff has no proper record of the land he is claiming against the defendants. Otherwise, it can be considered that from when he purported to purchase the said suit land, he might have abandoned it from use. However, there is an issue of ownership. Whether the said Hamisi Selemani Kingaru was the lawful/rightful owner or original owner of the suit land for title to pass lawfully to the plaintiffs if the said land claimed to be purchased is that land being owned/used by the defendants. Had it been clearly established that the suit land as the same purchased by the defendants in the subsequent sales, the plaintiffs would have benefited by the priority principle (see the case of Kimaro vs Joseph Mishili t/a Catholic Charismatic Renewal, Civil Appeal No 33 of 2017, CAT (unreported), Colonel Kashimiri vs Naginder Singh Mathain (1988) TLR 162, Melchades Johan Mbaga and 2 others, Civil Appeal No 57 of 2018, CAT (unreported) All in all, in totality of the plaintiffs' case, there is nothing of material evidence established to connect them with

the possession of the said land as alleged for want of proof. On the other hand, I have digested the testimony of defense case (1st defendant, 2nd defendant, and 4th defendant). It has been unfortunate that the 3rd defendant defaulted appearance on the date set for his testimony. His evidence was thus struck out pursuant to order VIII, rule 21 (b) of the Civil Procedure Code Cap 33, R. E. 2019. The first defendant on his part alleges to have purchased the suit land from Juma Kivurugo (as per DE 1 (a) exhibit). Amongst the witnesses for the said transaction were Juma Selemani and the son of Juma Kivurugo by name of Abubakari 9 Juma Lugome (DW2). That he later he sold part of it (8 acres) to the fourth defendant. The second defendant testified as DW4. In his testimony he claimed to have purchased the suit land from one Mzee Juma Jungu in 1992 (exhibit DE2 (a)) a total of ten acres. As he bought the suit land in 1992, the 2nd defendant claims superiority in ownership in terms of priority principle against all defendants and the plaintiffs. I have gone through all the WSDs, none has counter claim against either any of the plaintiffs or co-defendants. Therefore, this court cannot determine the issue of ownership as amongst the defendants but only the issue between the plaintiffs and the defendants who is the rightful owner of the disputed land. In my assessment to the evidence in record, as the available claims are from the plaintiffs against the defendants, I am satisfied that there is no any genuine claim against any one of the defendants. That said, the first issue (main issue) as who is the rightful owner of the disputed land, the available evidence extinguish both the first and second plaintiffs against any of the defendants. 10 As amongst the co-defendants themselves, in the absence of the counter claims, I am not in a proper position to determine now as who between the 1st, 2nd and 4th defendants is the rightful owner of the suit land. In that vein if there is any dispute between or amongst them, the same be determined by another separate proceedings. Let each one's status remain as it was prior to the institution of this suit or rather the filed case before DLHT Kibaha (if still in existence) should take its course. That said, the defendants are entitled to costs against the plaintiffs as the plaintiffs' suit is dismissed with costs. DATED at DAR ES SALAAM and MUSOMA this 31st August 2022 Court: Judgment delivered this 31st August by live video link connected from Musoma High Court to High Court Land Division – Dar es Salaam in the presence of Mr. Joseph Mandela 11 Mapunda, advocate for the plaintiff, Amandus Mweyunge, advocate for 2nd defendant, Mr. Geofray Paul, advocate for the 3rd defendant, 4th defendant is being absent and Mr. Gidion Mugoa, RMA. Right of appeal explained to any aggrieved party. 12

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