TANZANIA / JUDGMENT

a a sykes vs kinondoni municipal council and another 2021 tzhclandd 499 17 september 2021

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO. 140 OF 2017 A.A.K. SYKES ..... PLAINTIFF VERSUS KINONDONI MUNICIPAL COUNCIL ..... 1st DEFENDANT A.K. MUTUNGI ..... 2nd DEFENDANT

JUDGEMENT

Date of Last Order: 14/9/2021 Date of Judgment: 17/9/2021 A. MSAFIRI, J The plaintiff have instituted the above suit against the defendants jointly and or severally for the following reliefs; first, declaration that the plaintiff is the lawful owner of Plot No. 449 Mbezi Beach (herein as the disputed Plot) and the 2nd defendant a trespasser; second, an order compelling the 1st defendant to immediately process the plaintiff's application for the title deed in respect of the disputed Plot; third, the 1st defendant be ordered to take appropriate legal measures to resolve the 2nd defendant's ownership over the disputed Plot (if any) without disturbing and or affecting the plaintiff's ownership; fourth, the defendants be ordered to pay general damages to be assessed by the Court, fifth; costs of the case be paid by the defendants, and sixth; any other relief(s) which the Court may deem fit and just to grant. The factual allegations constituting the case of the plaintiff are pleaded in paragraphs 5,6,7,9,10,11,12 and 13. The plaintiff claims that he was allocated the disputed piot by the 1st defendant on 16.6.1983 and it was free from encumbrances, and since then he had been paying all relevant land rent fees and charges. That he was granted a building permit by the 1st defendant and started developing the disputed Plot. However, the boundary wall plus the house foundation he had constructed was demolished by the person who after investigation, he discovered that it was the 2nd defendant. He followed up the matter with the 1st defendant only to realize that the disputed plot appeared to have also been allocated to the 2nd defendant in

1982. The plaintiff claims that on 11/10/2007 the 1st defendant through its letter to the Commissioner for Lands, confirmed that the disputed plot belong to the plaintiff. He claims further that on 04/8/2008 the plaintiff applied for the title deed but the 1st defendant as the initial authority for processing the same has failed to process the plaintiff's application.

From the factual allegations in the plaint, the plaintiff's case is based on the propositions that the 1st defendant has double allocated the disputed plot to two people i.e. the plaintiff and the 2nd defendant. Whereas he is asking the Court to declare him the lawful owner and the 2nd defendant the trespasser. The 1st defendant filed their written statement of defense on which they vehemently denied the allegations and put the plaintiff into strict proof. However, the 2nd defendant failed to file his written statement of defense within statutory time so my predecessor in the office Madame Judge Mgonya ordered for the suit to proceed exparte against the 2nd defendant on 14/9/2017. At the final pretrial conference, the following issues were framed for determination, 2

1. Whether the plaintiff is a lawful owner of Plot No. 449, Mbezi Beach.
2. Whether the 1st defendant is compellable to process the plaintiff's title deed application.
3. To what reliefs are the parties entitled. At the hearing, the plaintiff was represented by Mr. Francis Mgare, advocate while Ms. Leah Mnzava, advocate appeared for the 1st defendant. As observed earlier, there was an exparte order against the 2nd defendant. On the plaintiff's case, led by Mr. Mgare, the plaintiff testified as PW1. He claimed to be declared the owner of Plot No. 449 Mbezi Beach area. He stated that he applied for the disputed plot and was supplied with a letter of offer of 16/6/1983 and the same was given to him by Dar es Salaam City Council. At that time, the whole of Dar es Salaam was under Dar es Salaam City Council and that is the authority which allocated him the disputed Plot. He tendered a certified true copy of letter of offer with reference No. D/KN/A 223323/1/MHKH dated 16/6/1983 as exhibit "Pl". He also produced rent payment receipts which were admitted collectively as exhibit "P2". He stated further that after being allocated the disputed plot, he requested and was given a building permit. He tendered the building permit which was admitted as exhibit "P3". After that, he started building a fence then a foundation, but later he discovered the same has been demolished. Upon that discovery he conducted a search at the Ministry of Land about his plot but there was no record at the said Ministry. He produced letter of search Ad 3 result with reference No. RD/D/VCL. XXVI/3 dated 11/12/2003 and the exchequer receipt which were admitted collectively as Exhibit "P4". He then followed up the matter at Kinondoni Municipal Council where they said they will take the matter to the Ministry of Land to confirm the ownership of the disputed plot. He produced the letter from Mkurugenzi wa Manispaa Kinondoni to Kamishna wa Ardhi dated 11/10/2007 which was admitted as Exhibit "P5". That after some research, he discovered that it was Mr. Mutungi, (the 2nd defendant) who was involved in the destruction of his structure. He went to complain at Kinondoni Municipal Council as well as the Ministry of Lands. At the Ministry he was told that the disputed plot was given to Mr. Mutungi in 1982. He was given a copy of the letter which shows that Mr. Mutungi was given that Plot. He produced that copy which was addressed to Mr. Mutungi and copied to him dated 24/4/2009 which was admitted by the Court and marked as Exhibit "P6". After that he decided to take legal action against Kinondoni Municipal Council. The plaintiff testified further that, in 2007, he wrote a letter to Municipal of Kinondoni requesting to confirm the owner of the disputed plot and they

informed him that the plot was given to him. He then wrote a letter to the Ministry of Land in 2008 asking the same and the Ministry responded that the plot was given to the 2nd defendant. He tendered the letter he wrote to the land officer on 04/8/2008 requesting for the issuance of title deed which was admitted in Court as exhibit "P8". He prayed to be declared the lawful owner of the disputed plot, however, he withdrew his second prayer for order to compel the Kinondoni Municipal 4 i Council to process the title deed for the reason that the same is the land allocating authority so it should process the title deed of the disputed plot in the plaintiff's name. On cross examination by Ms. Mnzava, the plaintiff stated that he didn't get any notice from Dar es Salaam City Commission concerning owners of the plot and was not aware of any directives to plot owners. He said that the last payment of land rent fee was in 2008/2009, that later when he attempted to pay the land rent for 2010, his name was rejected in the computer system. He contend that between 1985 and 2001 he didn't process for the title because he was told that the Deed Plan was not yet prepared. He averred that, at the Ministry of Land it is a Title Deed which is registered and he was not registered as a title deed holder. He stated that he didn't sue the Ministry of Land who is responsible with issuance of title deeds because all applications start at the Municipal Council. He admitted that the 2nd defendant was allocated with the Plot in 1982 while he, the plaintiff was allocated the same plot in 1983. He said that he was suing the Kinondoni Municipal Council although it is not the authority for processing title deeds. On re-examination, he said further that he did not see the reason/importance of suing the Ministry of Lands. He stated further that, Exhibit "P6" does not show the authority which allocated land to Mr. Mutungi. He said that, the change from City Commission to Kinondoni Municipal Council did not affect his rights as owner of the disputed plot. After the testimony of PW1, the plaintiff closed their case. on the defence, DW1 testified that he is a Land Officer at Kinondoni Municipal Council. He said further that, in accordance with the records available to his office, there are two different plots, i.e. plot no.449 Mbezi Beach and Plot No. 449 Block 'K' Mbezi. He added that as per their records, the two plots are situated in different areas and were issued on a long-term lease. Plot No. 449 Mbezi Beach is based on an offer issued to Sykes and similarly Plot No. 449 Block K Mbezi is based on an offer issued to Mutungi. However, he did not produce the said two offers before this Court. DW1 identified Exhibit Pl which is a certified copy of the letter of offer in relation to plot No. 449 Mbezi Beach which was issued to the plaintiff. He stated that Plot No. 449 Mbezi Beach has no Block, whereas Plot No. 449 is situated at Block K, Mbezi Beach. The 2nd defendant was issued with a letter of offer and a certificate of Title. He did not tender any of the said documents in the Court. He asserted that the plaintiff should have sued that Commissioner for land as Kinondoni Municipal have no authority to issue title for plots situated in Mbezi area but the Commissioner for Land has that mandate. He testified further that his office informed the plaintiff that Plot No. 449 Mbezi Beach was allocated to him and was different from Plot No. 449 Block K Mbezi Beach which was allocated to the 2nd defendant. On cross examination, DW1 said that Plot No. 449 Mbezi Beach and Plot No. 449 Block K Mbezi Beach are different but when asked by Mr. Mgare, advocate for plaintiff about Exhibit 'P6', he stated that Exhibit 'P6' is a letter from the Commissioner for Land to Mutungi and was copied to Sykes, it shows

that two plots refer to one and not separate plots. He nevertheless maintained that the records at his office shows that they are separate plots and there are two files one for plot No. 449 Block K Mbezi and another for Plot No. 449 Mbezi Beach. DW1 explained that preparation of a Certificate of Title has three process i.e. the Land Office prepares a letter of Offer, the Commissioner for Land prepares a certificate of title and the Registrar of Titles register it. He stated that the plaintiff was issued with a letter of offer with Kinondoni Municipal Council and that the Ministry took the responsibility of preparing the titles and present them to the Commissioner for Land in areas of Ununio, Boko, Jangwani Beach, Mbezi Beach and Mbezi. He said that the Municipal Council is not involved in the said areas but the assistant Commissioner for Land for Dar es Salaam Zone. He agreed that his office has not issued any evidence that they have informed the plaintiff that the said plots were different. DW2 testified that she is a land officer in the office of the Assistant Land Commissioner, Dar es Salaam Region. That Plot 449 Block "K" Mbezi Beach was previously allocated by the early system which is called demarcation. The plot was previously allocated to Kiiza Ajuna Mutungi in 1982. In 2007 through Ministry for Lands, there was operation of reviewing the title ownership. In the said review, Plot No. 449 Block "K" Mbezi Beach was changed and a new number was issued i.e. Plot No. 449 Mbezi Beach without a Block number. The one who was the owner was Ajuna Kiiza Mutungi. 7 After review, Ajuna Kiiza Mutungi was given a new title offer dated 21/7/2009. In 2010, the owner Ajuna Kiiza Mutungi was given a Certificate of Title No. 1166539, so the current status of Plot No. 449 Mbezi Beach is under the ownership of Ajuna Kiiza Mutungi. DW2 tendered the certified true copy of the certificate of occupancy of Plot 449, Mbezi Beach which was admitted in Court as Exhibit DI. The witness did not produce the original f document and did not give out any reason(s) before the court. When DW1 was shown Exhibit Pl which is a certified true copy of the letter of offer for Plot No. 449 Mbezi Beach, she stated that, the same has no official stamp or signature of a land officer who issued it. She said further that Exhibit Pl is different from the copy of offer of letter which A.A.K Sykes (plaintiff) brought before he Commissioner for Lands requesting for a certificate of Title. She asserted that, the difference between the two documents is fatal because the copy of letter which is issued to the client, must be similar to the copy which remains in the file of Commissioner for Lands. However, she did not produce the said copy which is under their custody so that the Court could have an opportunity to ascertain on the purported authenticity of the two documents. She contended that, Exhibit Pl is not in the Commissioner for Land's file, even that copy which was brought by A.A. Sykes requesting for ownership is not in the Commissioner's files. DWz stated that Exhibit Pl which is shown to be issued by District Land Office Kinondoni has not been signed by the Land Officer of the Municipal, has no official stamp on the signature so, the document is not authentic. 3 She prayed for this Court to recognize the iawful ownership of Plot 449 Mbezi Beach to belong to Ajuna Kiiza Mutungi and not A.A. Sykes. On cross - examination, DW2 stated that the Plots No. 449 Plot "K" Mbezi Beach and No. 449 Mbezi Beach are one and the same, it was renamed in 2.007 to be 449 Mbezi Beach and the changes were made by the Director of Maps and Survey. She stated that the disputed plot was allocated by Kinondoni Municipal, and the authorities which are empowered to issue

allocation of land are Municipal, City Council of Dar es Salaam and the Ministry for Land through Commissioner for Land. DW2, stated further that in 1982, the letters of offer were being issued by all three named authorities, therefore, there was a possibility of there being a double allocation, and that is why there was a review. When shown Exhibit Pl by the plaintiff's counsel, she stated that, it was certified by the District Land Office Kinondoni but she was not sure about the signature and the stamp as they were not in the place they are supposed to be on the document. She said that the letter of offer by A.A. Sykes is not recognized by the office of Commissioner for Land hence it cannot be revoked. DW2 was shown Exhibit P4 which is a reply letter of official search enquiring on the disputed plot which was done by the plaintiff, a search which shows that there was no record in the Land Register. She stated that if the plot has offer but has no title, there cannot be record on the said plot. That the letter of offer by the plaintiff is not recognized as authentic. She asserted that Exhibit Pl is not authentic and legal document. After that the defence closed their case. 9 After hearing the evidence of both sides including oral and documentary evidence, what is next is determination of three issues which were framed in this matter.

1. Whether the plaintiff is a lawful owner of Plot No. 449 Mbezi Beach (disputed Plot). As per the evidence of plaintiff, he is claiming that he is the lawful owner of the plot. To prove this, he has tendered Exhibit Pl which is a certified copy of letter of offer. It is from District Land Office Kinondoni dated 16/6/1983. The letter is addressed to A.A.K. Sykes (plaintiff) concerning Plot No. 449 Mbezi Beach Area. The offer states that the addressee's application for a long term Right of occupancy over the plot has been approved by the plots allocation committee meeting held on 27/8/1981. The letter is certified true copy and it is signed, stamped, and dated on 19/6/1997. Again, the plaintiff produced Exhibit P2 which are land rent payment receipts which shows that the same has been paying land rent on Plot No. 449, Mbezi Beach from 1997 to 2008. He produced Exhibit P3 which is Building Permit issued on 04/3/1986 by Engineering Department, City Council of Dar es Salaam permitting the plaintiff A.A.K. Sykes to erect a residential building on Plot No. 449 Mbezi Beach. On 11/12/2003, the plaintiff wrote an application for official search over Plot No. 449 Mbezi Beach, the letter was addressed to Land Registry, Dar es Salaam. The Senior Assistant/Registrar of Titles responded that the search has been done, there is no record in the Land Register (Exhibit P4). io He then wrote a request for a Title Deed on Plot No. 449 Mbezi Beach Das- es Salaam on 04/8/2008. It was copied to the Kinondoni Municipal (Exhibit P8). Also, Exhibit P5 shows that the Plot No. 449 Mbezi Beach area was previously allocated to M.A. Kashonde by a letter of offer dated 11/2/1983, but later it was reallocated to A.A.K. Sykes on 16/6/1983 and that until the letter Exhibit P5 was written by Director, Kinondoni Municipal to Commissioner for Land on 11/10/2007, there was no change of ownership. However, despite this evidence from the plaintiff which includes oral and documentary evidence, there is evidence that A.K. Mutungi is actually the owner of Plot No. 449 Mbezi Beach. There is exhibit P.6, which is a letter from Land Department (the office of Commissioner for Land) Dar es Salaam addressed to A.K. Mutungi dated 24/04/2009. The letter which was also copied to A. Sykes the plaintiff, states that Plot No. 449 Mbezi Beach was formerly known as Plot No.449 Block 'K'

Mbezi in 1982. Later it was reviewed and some of the areas of Block 'K' were moved/placed to Mbezi Beach area. Therefore, Mbezi Beach is the same area which was formerly known as Block 'K' Mbezi and that it was A.K. Mutungi who was allocated the said area since 1982.. This evidence is corroborated by the testimony of DW2 who told the Court that the disputed plot was formerly known as Plot 449 Block 'K' and was allocated to Kiiza A. Mutungi in 1982. That after review in 2007, the disputed Plot's name changed to Piot No. 449 Mbezi Beach owned by Mutungi who was later given a Title Deed in 2009. She produced the said Title as exhibit DI. However, I find the defence evidence to have contradictions. DW1 told this Court that Plots No. 449 Mbezi Beach and No. 449 Block 'K' Mbezi are different Plots, and have different files according to the record available to his office i.e. Kinondoni Municipal Council. He stated that according to their records, Plot No. 449 Mbezi belongs to A.A. Sykes (Plaintiff) while Plot No. 449 Block 'K' is owned by A.K. Mutungi. When shown the Exhibit P.6 which is a letter of Commissioner of Land to A.K. Mutungi regarding his ownership of plot No. 449 Mbezi Beach, DW1 insisted that Plot No. 449 Mbezi Beach is based on an offer issued to A.A Sykes, while Plot No. 449 Block 'K' Mbezi was also issued with an offer and it belongs to A.K. Mutungi. He even pointed out that the two plots are situated in different areas. Contrary to the testimony of DW1, DW2 states that the disputed plot was formerly known as Plot 449 Block 'K' Mbezi Beach and that it was changed in 2007 to be renamed Plot 449 Mbezi Beach. She stated further that these plots are not two different plots but are one and the same. When she was asked on cross examination about the testimony of DW1, she responded that she does not know about that and maybe DW1 was lying. Here, the defence case shows contradiction of the two defence witnesses who are both land officers. DW1, a Land Officer employed by Kinondoni Municipal Council and DW2 a Land Officer from the Office of Assistant Land Commissioner Dar es Salaam Regarding the authenticity of Exhibit Pl, this Court finds that the allegations raised by DW2 lacks basis. DW2 told this Court that Exhibit Pl has no legal authentic because it has no official stamp or signature of Land Officer. She stated that Exhibit Pl is different from the copy of letter of offer which A.A. Sykes brought before the Commissioner for Land requesting a Certificate of Title. She said that the difference between the two documents is fatal. However, she did not point out the supposed fatality difference between the two documents i.e. Exhibit Pl and other one which in their custody at the Commissioner for Land. She did not produce in Court the copy which was supposed to have remained in the file for Commissioner for Land. So, the Court did not have opportunity to see and compare the two documents. Furthermore, on Exhibit Pi's lack of signature of land officer and official stamp, on cross examination DW2 was shown Exhibit Pl and she admitted that the official stamp and signature was there only they were not placed on the proper area on the document i.e. the signature and official stamp were on top of the document instead of the bottom of the document. DW2 did not object or challenge the authenticity of official stamp of the District Land Officer, Kinondoni, Dar es Salaam or the signature appearing on Exhibit Pl but only that they were placed on the wrong position. I find that the reasons advanced by DW2 are trivial and cannot raise doubt to the authenticity of Exhibit Pl. From the above analysis, I am of the view that, on balance of probability, the plaintiff evidence is heavier than that of the defence side. From the documentary evidence

he produces before the Court, it is crystal clear that 13 he was given a letter of offer, and even a building permit regarding the disputed Plot. He has been paying land rent on the same and even went further to start processing for certificate of title. The plaintiff has shown step by step, how he had acquired the disputed plot, given the letter of offer and building permit and was he even processing for Title. On the other side, what was brought by the defence evidence shows lack of coordination or poor communication on land allocation management between the three institutions which have authority to issue allocation of land i.e. Municipal of Kinondoni, the City of Dar es Salaam and Ministry of Land through Commissioner for Land. This is a pure case of double allocation. This incoordination is clearly shown by contradictory evidence of DW1 a land officer from Kinondoni Municipal and DW2, a land officer from the Commissioner for Land, on the disputed plot. As per the evidence, the court is faced with the situation where the plaintiff has a certified copy of letter of offer and a building permit both issued in 1983 while the defence produced a copy of certificate of Title issued to A.K. Mutungi in 2009. So, in such situation, who is the legal owner of the disputed Plot? In the case of Amina Maulid Ambali and Others vs. Ramadhani Juma, Civil Appeal No. 35 of 2019 (CAT) the Court of Appeal while determining the situation where by the respondent in that matter tendered a documentary evidence showing that he has a certificate of title of the suit property, has this to say; 14 "In our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained. Despite that principle which was set in the above celebrated case, I am of the firm view that each case can be determined according to the circumstances surrounding the subject matter. In that breath I find that the circumstances surrounding the case before me is different and therefore cannot be weighed the same with the situation in the cited case. Therefore it is my opinion that case of Amina Maulid Mbali & 2 others Vs. Ramadhani Juma (supra) is distinguishable from the matter before me. It is true that the defence produced Exhibit DI which is a certified true copy of Certificate of Title No. 116539, issued in 29/4/2010. The said certificate is in the name of Ajuna Kiiza Mutungi for Plot 449 Mbezi Beach, Dar es Salaam Tanzania. However, the plaintiff has also produced Exhibit Pl which is a certified copy of letter of offer granted to him in 1983 on the same plot 449 Mbezi Beach and exhibits P2 and P3 which were not objected by the defence whose the plot named 449 Mbezi Beach. Exhibit P3 is a building permit dated 1986, while Exhibit P2 is the land rent receipts showing payment of Land rent on Plot No. 449 Mbezi Beach. Although it was said that Mr. Kiiza Mutungi was also granted a letter of offer in 1982, the same was never tendered in court and neither Mr. Kiiza Mutungi attended the court to defend his side since the matter proceeded exparte against him as he chose not to enter appearance in court. 15 From the above reasons, having obse ved the contradictions on the defence case which clearly shows a case of double allocation and considering the evidence on record that it was the plaintiff who was first allocated the disputed land as per exhibits Pl, P2 and P3,1 hereby answer the first issue in affirmative that, the plaintiff is the lawful owner of the disputed plot.

2. Whether the 1st defendant is compellable to process the plaintiff's title deed application. To determine this issue, first one has to know whether the 1st defendant who is Kinondoni Municipal Council has the mandate or authority to process the title deeds from interested applicants and that mandate is solely rested on the Municipal Council. In his testimony, DW1 a Land Officer from the Municipal Council stated that, they have no authority to issue titles situated in Mbezi area, the mandate is with the Commissioner for Land. In cross examination, he told the Court that the Municipal Council is responsible for issuance of letters of offer. And that the plaintiff was issued an offer with Kinondoni Municipal council. DW2 also stated that there are three authorities which are empowered for land allocation that is the Municipal Council, the City Council of Dar es Salaam and the Ministry for Lands through Commissioner for Land. DW2 stated further that, in this matter, Kinondoni Municipal issued a letter of offer and the certificate of title was processed by the Commissioner for Land. Hence, as per the available evidence, the Kinondoni Municipal Council alone cannot be compelled to process the certificate of title as there are other 16 authorities under the Ministry of Land which are the Commissioner for Land and the Registrar of Title. As shown, the Municipal Council is responsible for the issue of offer. Therefore, this Court is of the view that the Municipal Council of Kinondoni cannot be compelled to process the certificate of title as it is only the initiator of the process while there are other authorities which have powers to complete the process and issue the said Title. By this, the second issue is answered in the negative.

3. What reliefs are parties entitled to? In his claims, the plaintiff prayed before this Court for the following orders;

1) Declaration that the plaintiff is the lawful owner of Plot No. 449 Mbezi Beach (herein as the disputed Plot) and the 2nd defendant a trespasser. On this, for the reasons analysed hereinabove, this Court, hereby declares the plaintiff the lawful owner of Plot No. 449 Mbezi Beach.

2) The 1st defendant to be compelled to immediately process the plaintiff's application for the title deed in respect of Plot No 449 Mbezi Beach; On this, as per the analysis regarding determination of the second issue hereinabove, the court hereby finds that the 1st defendant cannot be compelled to process the plaintiff's application for the said title deed. Hence, the plaintiff will have to follow the procedures as per the law and regulations on land allocation to process for the same.

3) The 1st defendant be ordered to take appropriate legal measures to resolve the 2nd defendant's ownership over the disputed Plot (if any) without disturbing and or affecting the plaintiff's ownership; On this again, the court finds that the 1st defendant is not the sole authority on granting of land ownership so cannot be ordered on the same.

4) The defendants be ordered to pay general damages to be assessed by the Court; On this, it trite law that before the award of damages is issued in favour of the plaintiff, the same has a duty of proving wrongfulness of the defendant's conducts. However in the present matter, I

have failed to detect a scintilla of evidence from the plaintiff to prove of any suffering he has contracted by the conducts of the defendants. In his evidence, the plaintiff as PW1 told the Court that he has constructed a wall fence and a foundation on the disputed plot but the structures were demolished by the 2nd defendant. However, there is no any other evidence to prove that except oral, uncorroborated evidence by the plaintiff. For this reason the court cannot award for the damages by mere claims of the plaintiff.

5) Costs of the case be paid by the defendants; and;

6) Any other relief(s) which the Court may deem fit and just to grant. For the reasons I have endeavored to address hereinabove, the plaintiff is granted reliefs as I hereby order as follows:

i) The plaintiff is declared the lawful owner of Plot No. 449 Mbezi Beach, Kinondoni, Dar es Saiaam; ii) The plaintiff is entitled to costs of this suit. 13 It is so ordered. A. MSAFIRI JUDGE 17/09/2021 19

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