

TANZANIA / JUDGMENT

JUDGMENT DELVINA MLAY VS GEORGE MKWASA AND DOROTHY MTAWA

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB-REGISTRY AT MBEYA LAND CASE NO. 15 OF 2022 DELVINA
MLAY.....PLAINTIFF VERSUS GEORGE
MKWASA.....1ST DEFENDANT DOROTHY
MTAWA.....2ND DEFENDANT

JUDGMENT

Date of last Order: 16th May, 2024 Date of Judgment: 24th July, 2024 KAWISHE, J.: The plaintiff, Ms. Delvina Maly approached this court on 5th May 2022 suing the defendants against a piece of land measuring 25 acres situated at Nandanga Village, Mbozi District in Songwe Region. Before this Court the plaintiff prayed for the following:

- (a) Declaratory order that the plaintiff is the lawful owner of the disputable area. 1
- (b) That the defendants are mere trespassers into the pieces of land measuring 25 acres.
- (c) A declaration for immediate yield of vacant possession by the 2nd defendant.
- (d) Payment of 12% from the date of the institution of the suit to the full payment as far as the value of the land is concerned.
- (e) Payment of 6% from the date of judgment to the final settlement.
- (f) Costs of the suit be paid by the defendants.
- (g) Any other reliefs as it will be deemed fit. In the course of the pleadings, the 2nd defendant filed a counter-claim that, she is the lawful owner of the disputed piece of land measuring 29 acres. That the plaintiff claims only 4 acres which the 2nd defendant sold to the plaintiff. She prayed to this Court to dismiss the plaint and declare the 2nd defendant the lawful owner of the disputable land. During the final Pre-Trial Conference, the following issues were framed to lead the court in deciding the main suit and the counter claim. The issues are:
 - 1. Who is the lawful owner of the disputed property.

2. Whether the disputed property was lawfully sold to the plaintiff by the defendants.
3. What reliefs the parties are entitled to. 2 When the suit was called for hearing the plaintiff enjoyed the services of Ms. Beatrice Kessy and Brigita Shayo, learned counsel. The defendants were unrepresented hence, fended for themselves. In proving the plaintiff's case, four witnesses marshalled and tendered 8 exhibits were tendered in court. The defendants did not call witnesses neither tendered any document in proving their case. They were the only witnesses in their case. During the trial of the plaintiff's case, Ms. Delvina Mlay who testified as PW1 stated that, in 2008 it was announced that, there was a farm in Nandanga Village being sold. She heeded to the announcement. She went to inspect the farm. Upon being satisfied with the same, she went to the village government. The plaintiff and the seller signed an agreement and paid money for the farm. She testified that she bought the farm on 21st June, 2008. That agreement to buy the farm was reached after the plaintiff, Delvina Theodory Mlay, her husband Mr. Evarest Mlay and their daughter Tanzanite Mlay had inspected the farm and made a decision to buy it. That the village leaders guaranteed them that, the farm was free from any encumbrances. She further testified that, the farm she bought measured 20 acres at Tanzania Shillings 1,275,000/-. Seller was George 3 Mkwasa (the 1st Defendant) and son of Dorothy Mtawa (the 2nd Defendant). She continued to state that, later in 2009 Dorothy Mtawa (2nd Defendant) sold her 4 acres at Tanzania Shillings 280,000/-. That the agreement on 20 acres sale was witnessed by the village leaders. The sale agreement between George Mkwasa and Delvina Mlay was admitted in court and marked PE1. The agreement of sale of 4 acres between Dorothy Mtawa and Delvina Mlay was admitted in court and marked PE2. In addition, PW1 stated that, in 2008 when she bought the area, they measured it locally by foot and it was 24 acres. However, in 2009 when she applied for customary ownership, land officers used Global Positioning System (GPS) to measure the farm and found that, the exact measurements were 25 acres. In that, there was a difference in the size of the disputed land by 1 acre. That after all the legal processes, PW1 was granted with customary right of ownership (Hati ya Kimila ya Kumiliki Ardhi). The Customary Right of Ownership was admitted in court and marked PE3. PW1 told the court that, she has been using the disputed farm for cultivation from 2008 up to 2020 when, Dorothy Mtawa raised the dispute. That in 2020 there was a public meeting at Mpemba, Momba presided by 4 the late H.E J. P. Magufuli former President of the United Republic of Tanzania, where Dorothy raised a banner. She complained before the President that, Delvina Mlay trespassed her farm. That as a result PW1 was called by the Prevention and Combating of Corruption Bureau (PCCB). That, PW1 and the 2nd defendant were summoned by PCCB officers at the disputed farm. That after the meeting at the disputed farm, PW1 received a copy of letter which was sent to the 2nd defendant concerning her complaints against PW1. The letter communicated a report of the PCCB's investigation on the disputed farm. The letter from PCCB to Dorothy Mtawa copied to Delivina Maly was admitted in court and marked PE4. PW1 continued to testify that, after the report of PCCB, the 2nd defendant, Dorothy Mtawa reported the matter to Momba District Commissioner. That as a result, PW1 the plaintiff, 2nd defendant Dorothy Mtawa, 1st defendant George

Mkwasa and Joyce Mkwasa were summoned in the office of the District Commissioner (DC). That District Commissioner appointed a commission of inquiry which included among others, land officers and officers from the office of the DC. The commission called the parties and met at the disputed farm. That they were required to show the boundaries of the disputed farm. She added that the land officers 5 measured and found out that the disputed farm measured 25 acres. She continued to testify that, the commission advised her (PW1) to leave the 1 acre to Dorothy Mtawa the 2nd defendant. But Dorothy Mtawa refuted. That the commission prepared a report on the disputed farm and the parties were availed with a copy each. PW1 prayed to tender the report in court but the 2nd defendant objected it. The court invited both parties to submit on the same and made a ruling. It was ruled out that, the objection was not on point of law. That the 2nd defendant instead of objecting the document, would have cross examined on the same if she was doubting its authenticity. The report was admitted in court and marked PE5. PW1 unfolded that, after the report of the commission formed by the DC, the 2nd defendant sued her before the Ward Land Tribunal at Mpemba (the Tribunal). That she (the 2nd defendant) was claiming the 20 acres sold by George Mkwasa the 1st defendant. The Tribunal ruled in favour of the plaintiff (PW1). The tribunal declared the plaintiff to be the lawful owner of the disputed farm. Being dissatisfied with the decision, the 2nd defendant appealed to the District Land and Housing Tribunal of Songwe, (the DLHT). The DLHT dismissed the case for non-joinder of parties. The decision of the 6 Ward Tribunal and that of the District Land and Housing Tribunal were admitted in court and marked PE6 and PE7 respectively. Replying to the counter claim, Ms. Delvina Mlay, as the defendant, defended herself that, George Mkwasa the 1st defendant sold her a piece of land measuring 20 acres. That it is evidenced by the documents she had tendered before this court. That in 2008, she bought 20 acres and later the 2nd defendant, Ms. Dorothy Mtawa approached her and sold her 4 acres as the 2nd defendant/plaintiff relocated to Mpemba. She lamented that every political leader who passes at Momba, the 2nd defendant/plaintiff would accuse the plaintiff/defendant to have taken her farm. To avoid confusion, I will refer the parties by their names. Ms. Delvina Mlay claimed that she has suffered mentally, physically and financially due to the hardships caused by Ms. Dorothy Mtawa. She argued that, she bought the disputed farm lawfully. She prayed for compensation from Dorothy Mtawa and George Mkwasa for the sufferings they caused to her. When cross examined by the 1st defendant, Ms. Delvina Mlay (plaintiff) stated that, the one who paid the money for the 20 acres agreement was her husband Mr. Evarest Mlay. That money being paid by her husband using Delvina's name there is no harm. That they are wife and husband. That the agreement was made in 2008, and the farm was measured locally by foot. She further replied that, in 2009 the disputed farm was measured by land officers using GPS. It was the time she applied for the customary right of ownership. That when PCCB went to investigate the land, she was not involved so that, she could have shown them the boundaries. She added that, in the copy of the letter she received from the PCCB showed that, the disputed farm measured 33.10 acres. She also replied that, she owns the 25 acres as per the agreement. She continued to reply that, PCCB stated that the 25 acres belongs to her. Upon further cross examination she stated that, they were advised to discuss the matter

with Dorothy Mtawa but they never had any discussion on the matter. Further cross examined, PW1 stated that, in the 20 acres she bought from the 1st defendant there are no family graves. That the family graves are in the 4 acres which she bought from Ms. Dorothy Mtawa, the 2nd defendant. She added that, the 20 acres had no house rather, there are natural trees. In the 4 acres there was a very old small house. That PW1 demolished it and reconstructed one for her servants. Ms. Delvina Mlay continued to reply that, when they went to the District Land and Housing Tribunal, the chairman quashed the decision of the ward tribunal because the 1st defendant was not joined in the suit. That the 1st defendant should have been joined since, he was the one who sold the disputed farm. When cross examined by 2nd Defendant, Ms. Dorothy Mtawa; PW1, Ms. Delvina Mlay responded that, she bought the 20 acres from George Mkwasa, 1st defendant who is the son of the 2nd defendant. That she bought 4 acres from Ms. Dorothy Mtawa, the 2nd defendant. That she followed legal procedures and later she was granted with customary right of occupancy of the disputed farm. She added that, the 4 acres agreement was witnessed in court. That the issue of graves was raised by the 2nd defendant in 2020, after the Tanzania National Roads Agency (TANROADS) started buying sand from the disputed farm. That officers from PCCB went to the disputed farm with the 2nd defendant but Ms. Delvina Mlay was not there. Further cross examined, PW1 stated that, the disputed farm when bought was measured locally by foot at 24 acres in total. When land officers measured by using GPS, it was discovered that, the total size of the disputed farm is 25 acres. She added that, at the Ward Tribunal, the members appended their signatures on their decision. That the boundaries of the disputed land are well set, only being disturbed by the Chinese constructors. PW1 further testified that, the land she bought from Ms. Dorothy Mtawa, the 2nd defendant included the old small house erected in that piece of land. That the 4 acres bought from the 2nd defendant are bordered by Mashaka, Road, Church and Sichone. That she also is bordered by Pili and Leonard as of the time when she bought the disputed 4 acres. When re-examined by Ms. Brigita, learned counsel, PW1 stated that she first bought 20 acres from Mr. George Mkwasa, the 1st defendant and later she bought 4 acres from the 2nd defendant, Dorothy Mtawa. That when she bought the 4 acres, Dorothy Mtawa, the 2nd defendant had sued the 1st defendant and he was already convicted and sentenced. That the family graves are located in the 4 acres she bought from Ms. Dorothy Mtawa, the 2nd defendant. She added that, she bought the disputed farm in 2008 and 2009 but the dispute started in 2020 when the Ileje -Tunduma Road was advanced to a tar mark level. Also, she allowed TANROADS to fetch materials from the disputed land and would return the piece of land to PW1. She added that, TANROADS decided to fetch the materials from part of the 20 acres and 1 acre from the 4 acres. That they fetched stones for road construction. She finalized by stating that, she is married to Mr. Evarest Mlay, and they celebrated Roman Catholic marriage in 1987. 10 Ms. Joyce Daud Mkwasa testified as PW2. She told the court that, Dorothy Mtawa, the 2nd defendant is her biological mother and Mr. George Mkwasa, the 1st defendant is her young brother. She told the court that, in 2008 the 1st defendant and 2nd defendants were living in Nandanga Village. That in 2008 her young brother was killed. That the neighbours and the relatives never informed them about the murder of their brother.

That, no one consoled them on the awful act. As a result of the murder and the estrangement of the neighbours and relatives, the 2nd defendant was affected psychologically. They decided to take her to Mpemba Village. That they left George Mkwasa, 1st defendant at Nandanga Village. PW2 further told the court that, as family they agreed that, the 1st defendant Mr. George Mkwasa has to sell the disputed land so that they can find another place to relocate the 2nd defendant, Ms. Dorothy Mtawa, their mother. That, Mr. George Mkwasa, the 2nd defendant found a customer, who was Delivina Mlay. That the measuring of the disputed land was done with Ms. Delvina's husband Mr. Evarest Mlay. That the money received from the sale of the 20 acres was used to buy a piece of land for Ms. Dorothy Mtawa, the 2nd defendant. That the remaining some of the money was given to the 2nd defendant for maintenance. 11 PW2 continued to testify that, the house the 2nd defendant is residing today is a result of the money which the 1st defendant, Mr. George Mkwasa got from the sale of the disputed land. She added that, since 2008, she knew that, Ms. Delvina Mlay, the plaintiff (PW1) as the lawful owner of the disputed land. PW2 hinted the court that, in 2009 her mother, Ms. Dorothy Mtawa, the 2nd defendant followed the plaintiff, Ms. Delivina Mlay and sold her 4 acres to make a total of 24 acres. PW2 insisted that, the money got from the sale of the 20 acres was used to buy a piece of land for the 2nd defendant and treatment from the challenges she suffered from the murder of her son, the late brother to PW2. She continued to testify that, the disputed land (20 acres) was sold over one million Tanzanian Shillings. That the 1st defendant gave the money to the 2nd defendant, but did not give her the sale document. That when the sale document was given to the 2nd defendant, she inquired why the 1st defendant gave her less money compared to what was on the sale document. The 1st defendant told the 2nd defendant that, 10 per cent of the money was given to the Village Executive Officer (VEO) who witnessed the sale and some money was given to those who assisted in measuring the disputed land. That the 2nd defendant took Mr. George Mkwasa, the 1st defendant to police and later to the court of law. PW2 further told the court that, the 20 acres was sold by Mr. George Mkwasa, the 1st defendant under the permission of the family. That the 4 acres were sold by Ms. Dorothy Mtawa, the 2nd defendant. That it remained 1 acre with family graves. PW2 continued to testify that, when the Land Officers and the PCCB measured the disputed farm, they found that, it has a total of 33.10 acres. That the officers told 1st, 2nd Defendants' family to sit with the plaintiff, to settle the mother on the difference on the measured disputed land. She told the court that, their family never adhered to the advice given by the officers. That the disputed land was one piece. The family graves are in one acre. That the 25 acres include the one acre with the family graves. PW2 testified further that, the dispute arose when the 1st and 2nd defendants' family heard that the Chinese constructed a road over the family graves. That it was the 1st defendant, Mr. George Mkwasa who informed the family that, the Chinese paid Ms. Delivina Mlay, the plaintiff and neighbours some money thus, the challenge began in 2019/2020. 13 Upon being cross examined by the 1st Defendant, PW2 responded that, the family graves are there and the 1 acre left from what was measured by the land officers. That the 1 acre is within the 24 acres measured locally, whereas the officers measured scientifically. That the 1st defendant was residing in Nandanga Village when, he

sold the 20 acres to Ms. Delvina Mlay, the plaintiff. That the information she gave in court is the same which she told the PCCB officers and the District Commissioner. That the 1st defendant is the one who sold the 20 acres to the plaintiff, and the 1st defendant is their brother in the family. When cross examined by 2nd defendant, PW2 responded that, there was a family meeting which allowed the 1st defendant to sell the disputed farm. That there were no minutes taken on that meeting. That as family they agreed to relocate the 2nd defendant (Ms. Dorothy Mtwawa) as she was sick and her life in Nandanga Village was at risk. That the money gained from the sale of the disputed farm was used to buy the piece of land and the house in which the 2nd defendant is residing in today. PW2 testified before the court that, the major issue with the 2nd defendant is that, the family through the 1st defendant sold the disputed farm to Ms. Delvina Mlay, the plaintiff at a low price and that the plaintiff got a lot of 14 money from the Chinese. That it is true that the 2nd defendant has been complaining before politicians. She complained to the Regional Commissioner, District Commissioner, and in the Ward Tribunal since 2019. PW2 continued to respond that, they decided to sell the disputed farm due to what happened, the murder of their young brother. That it was the husband of PW2 who informed the family about the murder of their young brother. That the family authorized the 1st defendant to sell the disputed farm and the plaintiff bought the disputed land lawfully. There was no re- examination. Youngson Tennison Siwale, testified as PW3. The witness told the court that, the dispute is about the boundaries. That George Mkwasa, the 1st defendant is claiming that, the disputed land is bigger than the 20 acres which he sold to Delvina Mlay, the plaintiff. PW3 told the court that, he witnessed the selling of the disputed farm. That it measured 20 acres. That the seller was Mr. George Mkwasa, the 1st defendant while, the buyer was Ms. Delivina Mlay, the plaintiff. PW3 added that, the selling was carried out in June, 2008. That at that time, one acre costed Tanzanian Shillings 75,000/-. That Mr. George Mkwasa, the 1st defendant sold 20 acres to Delvina Mlay, the plaintiff. That when the 1st defendant was selling the 15 disputed land, it was Mr. Evarest Mlay who came with his daughter named Tanzanite Evarest Mlay, and were interested in buying the disputed farm. Mr. Evarest Mlay, asked for the presence of Nandanga Village leaders to assure him that the farm belonged to the seller. When he was assured by the leaders, he stated that, in the contract of sale be inserted the name of Ms. Delvina Mlay, his wife. PW3 continued to testify that, the Village Executive Officer prepared the contract. That Mr. Evarest Mlay paid more than One Million Tanzanian Shillings. That Mr. George Mkwasa received the money and he was with his brother-in-law Sandiwelo Msukwa (PW2's husband) now deceased. PW3 further told the court that, the farm was advertised for sale. That Mr. George Mkwasa stated that, he was selling the disputed farm on behalf of the family. That Mr. George Mkwasa was given the money for the sale. That the persons present at the transaction were Juma Simbeye, Amos Simkanga who was the Village Executive Officer now deceased. Also, there was another woman. That from the date of the selling of the disputed farm, the plaintiff has been using the disputed farm and she is the lawful owner of the same. 16 Cross examined by 1st Defendant, PW3 responded that, Ms. Delvina Mlay is the one using the disputed farm. That she was not at the discussion of the sale. That Mr. Evarest Mlay after discussing with his daughter Tanzanite, they wrote the

name of Ms. Delvina Mlay. That as a witness, he could have not signed the contract if he did not know the boundaries of the disputed farm. That Mr. Evarest Mlay knew the boundaries of the disputed farm and he is the one who showed the plaintiff the boundaries. That the plaintiff is the lawful owner of the disputed farm as she has the right of occupancy. That the plaintiff could have not been granted with the right of occupancy if she did not know the boundaries. The 2nd defendant did not cross examine the witness. Upon re-examination by Ms. Brigita, learned counsel for the plaintiff, PW3 stated that, he witnessed for George Mkwasa, 1st defendant when he was selling the disputed land. That Mr. Evarest Mlay asked PW3 to confirm that the disputed farm belonged to Mr. George Mkwasa. He added that he and George Mkwasa are relatives. Mr. Frankson Spaiti Mwashitete testified as PW4. He told the court that a peasant and street chairman within Nandanga Village. That he knows Ms. Delivina Mlay, the plaintiff; Mr. George Mkwasa, the 1st 17 defendant and Ms. Dorothy Mtawa, the 2nd defendant. That he was elected in 2015 to be street chairman. He testified before the court that, he came to know about the dispute in 2020 when delegates from the office of the Momba District Commissioner approached him concerning the disputed farm in Nandanga Village. That the delegation measured the disputed farm and found out that it belongs to Ms. Delvina Mlay. They asked Delvina Mlay to give back one acre to Ms. Dorothy Mtawa. In that acre there are family graves. PW4 added that since 2015 when elected, it was Ms. Delvina Mlay who has been using the disputed farm. In 2018 the government through TANROADS started fetching stones from the dispute farm. That TANROADS required him to call the people who own farms near the hill with construction materials. That he spread the information, people responded to the call, Ms. Delvina Mlay was among them. That payment list was prepared so that people could be compensated. He prayed to tender the list of names of people who were compensated by TANROADS. There was no objection. It was admitted and marked PE8. When cross examined by the 1st defendant, PW4 stated that, the defendants never reported any dispute in the street chairman's office. That the plaintiff gave back one acre with family graves to the 2nd defendant. 18 That he came to know the dispute when the delegation from the District Commissioner's office and the PCCB officers went to inspect the disputed farm. He added that the 1st defendant never went to his office for evaluation and payment. That the defendants never objected to the list of the people to be paid by TANROADS. Upon being cross examined by the 2nd defendant, the witness responded that, when the delegation from the District Commissioner's went to the disputed farm, Mr. George Mkwasa was at the disputed farm. He concluded that the disputed farm covers the hill where the road construction materials were drawn by TANROADS and it is owned by Delivina Mlay, the plaintiff. There was no re-examination. PW5 was Yohana Alikitoni Sichinga. The witness told the court that he knew Ms. Delvina Mlay, the plaintiff in 2009. That at that time he was the Village Executive Officer. He added that, the District Executive Director of Mbozi District Council (DED), required him to submitted the list of land owners in customary rights. Among the owners was Ms. Delvina Mlay, the plaintiff. That he knew the 1st defendant as the son of the 2nd defendant before he met Ms. Delvina Mlay in 2009. That during his tenure from 2009 to 2014 there was no dispute reported in his office over the disputed farm. 19 That Delvina Mlay is the lawful owner of the disputed land

as a copy of the documents are in the office of the village. That Ms. Delvina Mlay owns 25 acres. Since his tenure in office, Ms. Delvina Mlay has been using the disputed farm. When cross examined by the 1st defendant, the witness told the court that, the selling document was executed in 2008. That he came into office in 2009. He continued to testify that Ms. Delvina Mlay owns the disputed farms customarily. That the disputed farm measures 25 acres. He further responded that, the 1st defendant sold 20 acres to the plaintiff and the 2nd defendant sold 4 acres to the plaintiff. He concluded that when they were ordered by the DED of Mbozi to identify the owners of farms, it was the 1st defendant who showed them the boundaries of the disputed farm. When cross examined by the 2nd defendant, PW5 responded that, the plaintiff bought the disputed farm in 2008 and he went into village office in

2009. That the plaintiff bought 4 acres, she was required to give back the one acre with family graves. There was no re-examination. After the fifth witness had finished his testimony, the plaintiff's case was marked closed. The defendants were informed to prepare their 20 defence. The 2nd defendant prepared for the defence and her counter claim. As I stated earlier, the defendants did not call witnesses, they were the only witnesses in the case. Mr. Georged Daud Mkwasa, testified as DW1. He told the court that in 2008, he was living in Nandanga Village, Mbozi. That his brother Joseph Daud Mkwasa was murdered by villagers of Nandanga. The cause of the murder according to what was reported to the police is that, he was harvesting maize in a farm which did belong to him. That as family of the deceased they were not informed early. He added that, it was so sad that during the funeral of his deceased brother no villager came to the funeral. That their in-laws came and assisted in the funeral. He testified further that, it was their brother-in-law who married his sister Joyce Mkwasa (PW2) who advised them to relocate their mother due to the situation at the village. That after the funeral, his mother, Dorothy Mtawa, the 2nd defendant was suffering from hypertension. That PW2 took the 2nd defendant to Mpemba Village where, PW2 was residing. They discussed and agreed to sell part of the farm in order to get money to save the life of the 2nd defendant. They agreed and advertised the disputed farm for sale. That following the advertisement, the 1st defendant was called by 21 Youngson Tennison Siwale, PW3 to meet Mr. Evarest Mlay, Bi Sanga and Daughter of Mr. Evarest Mlay named Tanzanite. Upon meeting Mr. Evarest Mlay; his brother in-law informed him that, Mr. Evarest Mlay would like to buy the advertised farm. That they wanted to see the disputed farm. That the disputed in the south it is bordered by the road to Ileje, a hill in the North, East side there is another hill. That the disputed farm was in the middle, from south to the north. That after they were done with the measuring of the disputed farm, they went to the Village Executive Office (VEO). The VEO witnessed the selling. Mr. Evarest Mlay on that day paid Tanzanian Shillings 1,025,000/- balance due was Tanzanian Shillings 250,000/-. That VEO recorded that, all the price was paid. The VEO asked Mr. Evarest Mlay when he would pay the remaining sum. He responded very soon. But it took so long to the extent of taking more steps to recover the balance. The 1st defendant continued to testify that, after he had received the money, he followed his sister Ms. Joyce Mkwasa, PW2 with his brother-in-law,

Sandiwelo Msukwa. That they called his young brothers, Mebo Daudi Mkwasa, now deceased, Agness Daudi Mkwasa and his mother Dorothy Mtawa, the 2nd defendant. That he handed them with the money from the 22 selling of the disputed farm. That from that time, the looked for and bought a house for the 2nd defendant in Kokoto Street, Mpemba. That after the 2nd defendant's health had stabilized, she called the 1st defendant and queried him why the money from the sale was less. That the 1st defendant confessed that, the money was less as compared to what was on the agreement. That it was due to the fact that, he took some money and pay the go-between who advertised the farm for sale. That 2nd defendant was informed that, the buyer was a man but he wrote the name of Ms. Delvina Mlay his wife. That the 2nd defendant complained that, the money deducted was too much. That the 2nd defendant wanted to meet the buyer so that, she could inquire of him if that was the money he paid for the disputed farm. That the 1st defendant traced Mr. Evarest Mlay, explained to him the situation but could not go and meet the 2nd defendant. As a result, the 2nd defendant reported the matter to the police, the 1st defendant and the Nandanga Village Executive Officer were sued for invading the 2nd defendant's farm. They were arrested remanded and remanded Tunduma. She wanted them to bring the buyer. That later, the 2nd defendant went to the OCD of Mbozi. That the 1st defendant with Sandwel Msukwa, Dorothy Mtawa, the 2nd defendant and 23 Youngson Siwale went to the OCD's office. That the 2nd defendant had told the OCD what happened. That the OCD instructed the Ward Executive Officer (WEO) Chiwezi now Mpemba, to look for Mr. Evarest Mlay in three days to pay the rest of the money. That it was 7th December, 2008 the 1st defendant received a call from the WEO telling him to report at the Ward's office. The 1st defendant went with his brother-in-law, that they found Amos Simkanga acting WEO. He informed them that, Mr. Mlay brought the remaining sum. That he gave Mr. Evarest Mlay the sale agreement. That the 1st defendant gave the money to the 2nd defendant yet, she wanted to meet the buyer on a claim that the broker cannot take her money. That in 2009 the case was concluded. The 1st defendant and the VEO were sentenced to serve 6 months in prison or pay fine of Tanzanian Shillings 300,000/- each. That the VEO paid Tanzanian Shillings 600,000/-. The 1st defendant lamented that, he thought that they had finished the challenges. That the 2nd defendant told him that Ms. Delvina Mlay, the plaintiff has to come with her husband so that they could verify the boundaries. That it was in 2009. The 1st defendant continued to testify that, in 2009, he was called by the plaintiff informing him that, the 2nd defendant wants to sell to 24 her another piece of land. That he had moved from Nandanga Village and relocate in Katete. DW1 continue to testify that in 2020 he was called by PCCB officers saying that, they have meet with his neighbours at Nandanga as they had something to do at the disputed farm. That he called his neighbours, Mchungaji Muyoba, North West, Simitony Simbaya, East, Mashaka Simbeye. That he could not find Tennison Sichome. The PCCB and land officers from Tunduma Land Office arrived. The VEO was present. That upon arrival at the disputed farm, the land officers stated that they received complaints from Ms. Dorothy Mtawa, the 2nd defendant that, is why they came to the disputed land. He added that his neighbours were present, Mashaka Simbeye, Delvina Mlay, Mickson Sinkamba represented the street leader. That they

received complaints from Dorothy Mtawa that, TANROADS paid the people at that area, the money was paid to Ms. Delvina Mlay. They wanted to get evidence on the matter. He added that Ms. Delvina Mlay issued more than one documents showing that, she bought the disputed land from Mr. George Mkwasa and Dorothy Mtawa respectively. While defending his case, the 1st defendant requested for exhibit PE4 a copy of the letter from PCCB. The court granted and he went through it. He added that, Ms. Delivina Mlay issued the sale agreement which the 1st defendant sold her 20 acres, agreement of 4 acres and other agreement which exceeds 24 acres. Thus, PCCB wanted the 1st defendant, Mr. George Mkwasa to show them the boundaries to the whole land. He stated after that, the PCCB officers left and later they received the letter from PCCB. He prayed to quote the following: “Kupitia barua hii napenda kukujulisha kuwa ofisi ilifuatilia malalamiko yako kwa lengo la kubaini ukweli wake ili kuchukua hatua stahiki. Baada ya ufuatiliaji huo imebaini kwamba, shamba linaloongelewa lina ukubwa wa hekari 33.10 kama lilivyopimwa na wataalam kutoka idara ya mipango miji, ardhi na mazingira kutoka Halmashauri ya Mji Tunduma.” “Mauziano halali ambayo ufuatiliaji huu umeyabaini ni yale yaliyofanyika tarehe 21 Juni, 2008 ya hekari 20 kati ya George Mkwasa na Delvina Mlay na yale ya tarehe 10 Oktoba, 2009 ya hekari 4 kati ya Delvina Mlay na Dorothy Mtawa. Na hivyo kufanya kuwa kati ya hekari 33.10 za shamba lote, hekari 24 ndizo zinazoweza kuwa za mama Delivina Mlay na hekari 9.1 mauziano yake yana utata.” “Mkae kwa pamoja pande mbili, wewe na mama Delivina Mlay ili kutafuta muafaka wa mauziano ili kujaribu kutafuta mwafaka kwa njia ya mazungumzo kwa lengo la kila upande kupata haki yake hususan kwa hekari zile zilizobainika kuwa na utata katika mauziano yake. Endapo suluhu ya mazungumzo yatashindikana ni vema mkafika Baraza la Ardhi na Nyumba kwa ajili ya kupata suluhisho kwa njia ya sheria.” End of quote. DW1 continued to build his case by stating that, in 2020 he was informed by Mchungaji Amos Mlioba that, the members of the Ward 26 Tribunal Mpemba came to the disputed farm that there was dispute. He called one of the members to wait for him to come back from Dar es Salaam to show them the boundaries of what he sold to Mr. Evarest Mlay and the remaining part. That they did not wait for him. They continued and made decision. As a result, the Ward Tribunal Chairman did not sign the decision because it was not properly reached. That DW1 went to Delivina Mlay, the plaintiff so that, they could settle the dispute amicably. He added that, Delvina Mlay said to him, she had no problem rather, Dorothy Mtawa was embarrassing her by calling her an invader. That DW1 went to the 2nd defendant to discuss the idea of settling the matter as advised by the PCCB. That the 2nd defendant was not ready, she claimed that, DW1 and the plaintiff are invaders. That she wanted to arrest them all but the plaintiff escaped. Hence, the settlement idea failed. That in 2021, DW1 was called by the learned counsel for the plaintiff and was informed that, he was joined in the suit as a defendant so that, he may help the court to know the truth. That DW1 asked the counsel to help them but, she responded that, the 2nd defendant was not ready to settle the matter. That later, he was informed that, due to the Tunduma – Ileje road construction, the family graves were destructed. That he followed the foreman of the construction and was informed that, the plaintiff was paid for the same. DW1 informed the foreman that, if they compensated

the plaintiff, they were wrong. He told DW1 that, the matter will be reported to the TANROADS and see to what to be done. That the 2nd defendant did follow up for compensation on the family graves. He prayed to the court to consider the evidence given and the cost be paid by the plaintiff. The 2nd defendant/plaintiff did not cross examine the 1st defendant. When cross examined by Ms. Beatrice, plaintiff's counsel, DW1, agreed to have sold to Mr. Evarest Mlay, 20 acres. That later, on he came to know Ms. Delvina Mlay, the plaintiff is the wife of Mr. Evarest Mlay. That nothing wrong occasioned by Ms. Delvina Mlay, the plaintiff sending her husband, Mr. Evarest Mlay to buy for her the disputed farm. That the court to take note that, he sold the 20 acres to Mr. Evarest Mlay, whatever is in the reply to the plaint showing that, he did not sell the disputed farm to Mr. Evarest Mlay is due to being helped by a person to prepare the reply. That the 1st defendant was instructed by his brother-in-law to sell the disputed farm. That the 2nd defendant since 2008 to 2020 has been blaming the 1st defendant to have invaded her farm. That he was sued 28 before Tunduma Primary court and convicted under Criminal Case No. 16 of 2009. DW1 continued to respond that, the money paid in the first instalment he gave it to the 2nd defendant, Tanzanian Shillings 640,000/- the second instalment he gave the 2nd defendant/plaintiff Tanzanian Shillings 250,000/-. That Amos Simkanga the VEO witnessed the sale of the 20 acres. DW1 added that, the TANROADS paid compensation after he had sold the disputed farm to the plaintiff. That the dispute between them and the plaintiff is the boundaries. That according to PE4 the letter from the PCCB the disputed farm measures 33.10 acres. That if the plaintiff before this court is claiming her 24 acres, DW1 has no objection on that. Upon being cross examined by Ms. Brigita, learned counsel for the plaintiff, DW1 stated that, he never heard any disagreement between Ms. Delvina Mlay and Mr. Evarest Mlay. That the dispute started because Mr. Evarest Mlay paid the money and Ms. Delvina Mlay came to use it. That what stated in the counter affidavit is wrong. He confirmed that Delvina Mlay owns 24 acres lawfully. That according to PE4, PCCB stated that, the disputed area measures 33.10 acres. That customary right of occupancy granted to Delvina Mlay is on 24 acres. The disputed farm was scientifically 29 measured and found that, it is 25 acres. That PCCB stated that the disputed farm measures 33.10 acres but the 33.10 acres cannot be within the 25 acres. DW1 further stated that, according to PE4, the lawful sale agreement identified is the one made between George Mkwasa and Delvina Mlay on 21st June, 2008 of 20 acres, and that of 10th October, 2009 between Dorothy Mtawa and Delvina Mlay. He agreed that, the plaintiff is claiming 24 acres and she is the one using the disputed farm until the hearing of the case. After the cross examination, DW1 had nothing to add to his testimony. DW2 Ms. Dorothy Kesali Mtawa, 2nd defendant and plaintiff in her counter claim. She testified before the court that, she lived in Nandanga Village since 1970 until 2008 when her son was killed. Then she relocated to Mpemba Village. That she has been elections, won and it was the source of the murder of her son as they wanted to kill her. That given the dangerous situation at Nandanga, her son-in-law, Sandwelo Msukwa relocated her to another place to save her life. That she was unconscious, then her son-in-law together with her children agreed to relocate her and sell the disputed farm in Nandanga. That after the 1st defendant had sold the disputed farm, he went to see 2nd

defendant/plaintiff and called his 30 sisters including his elder sister Joyce Mkwasa, PW2 and gave the money to the 2nd defendant. DW2 added that in 2009 she became normal, called the 1st defendant to show her the buyer. That her in-law bought her a house. That the 1st defendant went to her with a woman called Bi Sanga who witnessed the sale of disputed farm, 2nd defendant chased them away on account that, why did she buy the disputed farm from her children while she is still alive. That later she reported to the police that, they invaded her farm and sold it, the 1st defendant was convicted by Tunduma Primary Court to pay Tanzania Shillings 300,000/- or serve a jail term of 6 months. DW2 further told the court that, in 2010 she sold 4 acres to Ms. Delvina Mlay, and the sale was attested before the primary court. That later, she was informed that the family graves have been destructed. Upon follow up TANROADS informed her that, the piece of land was owned by Ms. Delvina Mlay. That the Chinese constructors diverged the area with family graves. That the 1st defendant called Ms. Delvina Mlay asking her if she bought the family graves but she denied. That TANROADS manager told DW2 that they cannot pay her compensation because the right of occupancy belongs to Ms. Delvina Mlay. That the family graves were reconstructed and fenced by a red tape. That since TANROADS refused to 31 pay her, she started claiming that, she was not shown the boundaries of the disputed farm hence, she started using it. That as a result Ms. Delvina Mlay employed guards to guard the disputed farm. That she went to the PCCB complaining. When asked she responded that, the disputed farm measures 60 acres. But later the PCCB gave a letter showing that the disputed farm measures 33.10 acres, then she asked them why they did not call her. That PCCB told her that, the disputed farm belongs to Ms. Delvina Mlay. That later, she went to the Ward Tribunal, at the end of the trial, the decision was made in favour of Ms. Delvina Mlay although the chairperson did not sign the decision because they did not call DW2. That she went to the District Land and Housing Tribunal of Momba, where the matter was returned to the Ward Tribunal for a reason that the 1st defendant has to be joined in the case. DW2 continued to testify that the disputed farm sold to Ms. Delvina Mlay by the 1st defendant, George Mkwasa is not touched. That the Regional Commissioner was passing and everybody was giving her problems. That DW2 told him about Delvina Mlay. Then showed him the sale agreement between her and Delivina Mlay, and that of George Mkwasa and Ms. Delivina Mlay. That the Regional Commissioner when 32 looked that the documents told her that, the land belongs to her, DW2/plaintiff. That the Regional Commissioner went to the disputed land and ordered that Ms. Delvina Mlay be called. They met before the Regional Commission at the disputed farm. That DW2 showed him the piece she sold to Delvina Mlay and the piece which DW1, George Mkwasa sold to Delvina Mlay and stated before the Regional Commissioner that, she is not claiming for the land bought by Delvina Mlay, then the Regional Commission left them peaceful. Later she was called by the court broker and be informed that she had a summons to appear before the court being sued by Delvina Mlay. Cross examined by 1st Defendant, George Mkwasa, DW2/plaintiff responded that the 1st defendant was not involved in the meetings called by the Regional Commissioner. Cross examined by Ms. Beatrice Plaintiff/Defendant's learned counsel the DW2/plaintiff stated that following the murder of her son she started becoming

unconscious. That her son-in-law, Sandwell Musukwa bought her a house from the money gained from the selling of disputed farm in Nandanga Village. That they did not tell her how much they sold the disputed farm. That she sued George Mkwasa, 1st defendant as he did not bring the buyer to her. That she was the one to sign the agreement with the buyer. That she should have received the money and share it with her children. She added that, she sued them in the primary court for selling the disputed land without involving her. That she is aware that, primary court does not have jurisdiction over land matters. That she has no complaints on the 20 acres sold by the 1st defendant neither the 4 acres she sold to Delvina Mlay, she claiming for the family graves. DW2/plaintiff further told the court that she had to relocate to Mpemba Village because the Nandanga Villagers wanted to kill her. That her family sat and agreed to sell part of the farm. That when people were compensated, she was at Mbeya Referral Hospital attending her sick brother. She responded that Ms. Delvina Mlay has fake customary right of occupancy. That the plaintiff does not have evidence of ownership but has trees there and the family graves. The plaintiff/DW2 told the court that the Ward Tribunal stated that, the dispute farm is hers but did not declare her the winner. That is why the tribunal chairperson did not sign the decision. Also, the District Land and Housing Tribunal returned the decision to Ward Tribunal because she did not sue the 1st defendant. Continued to testify that, when she was selling the 4 acres, she was not told about the 20 acres. That she has now realized that the Regional Commissioner does not have powers to give her land, that is why she has ended up in this court. That what the 1st defendant stated in this court is the truth and she did not cross examine him. Upon being cross examined by Brigita, Plaintiff/Defendant's learned counsel DW2/plaintiff stated that, Frankson Mwashitete, PW4 stated that he was elected in 2015 but he knew Ms. Delvina Mlay as the one who was using the disputed land. The plaintiff/DW2 added that in the disputed farm she is bordered by Matekelesi Sichone, Simchimba, Mashaka Simbeye, Simiton Simbaya, Tennison Sichone, the Road and Assemblies Church. That the 1st defendant sold to Ms. Delvina Mlay in the middle of the disputed farm. That she did not state that, Ms. Delvina Mlay is her neighbour; that the one who wrote for her was wrong. That she is not claiming 29 acres. Upon further cross examination, the plaintiff/DW2 stated that in her counter claim she stated that, she owns 29 acres but no evidence adduced to prove the same. That the 1st defendant sold 20 acres to Delvina Mlay and she later sold her 4 acres. Done with cross examination, the 2nd Defendant/Plaintiff Ms. Dorothy Mtawa stated that, her son the 1st defendant sold the disputed farm. That 35 after the meeting with the Regional Commissioner, the 1st defendant apologized to her, before they concluded the matter, she was summoned to appear before this court. That his son, the 1st defendant did not show the plaintiff/DW2 the buyer of the disputed farm. This marked the close of the defendant's case and the counter claim. Both the parties did not have final submissions. Having heard the submission made by the parties, plaintiff, defence and perused the records available, it is an ample time to analyse the evidence adduced in line with the issues raised during the Final Pre-Trial Conference. In order to reach the desired rational decision in this matter, I will counter the issues in the sequence in which they were raised. That is, I will start with the first issue,

who is the lawful owner of the disputed property. The plaintiff testified as PW1, told the court that in 2008 there was an advertisement in Nandanga Village that, a piece of land was being sold. She inquired and was assured by village leaders that the farm was free from encumbrances. As a result, a decision to buy the disputed farm was reached and she bought the advertised piece of land. She added that, the 36 farm she bought measured 20 acres and the price was agreed at Tanzania Shillings 1,275,000/-. That the seller was George Mkwasa (the 1st Defendant) son of Dorothy Mtawa (the 2nd Defendant). She continued to state that, later in 2009 Dorothy Mtawa (2nd Defendant) sold her 4 acres at the price of Tanzanian Shillings 280,000/-. That the sale agreement of 20 acres was witnessed by the village leaders. The sale agreement between George Mkwasa, the 1st respondent and Delvina Mlay, the plaintiff was admitted in court and marked PE1. Agreement of sale of 4 acres between Dorothy Mtawa, the 2nd defendant/plaintiff and Delvina Mlay, plaintiff/defendant was admitted in court and marked PE2. In his defence, the 1st defendant Mr. George Mkwasa agreed to have sold the disputed land to the plaintiff upon a family agreement to save the life of the 2nd defendant due to the hostility emanated in Nandanga Village which costed the life of a son of the 2nd defendant. According the testimony of the 1st and the 2nd defendants the family agreed to sell the disputed land to relocate the 2nd defendant to Mpemba Village due to the hostile situation at Nandanga Village. That the 2nd defendant suffered from hypertension and loss of consciousness caused by the shock following the murder of her son. Further the 2nd defendant/plaintiff in the counter claim 37 told the court that after she recovered from the challenges, she suffered and she sold 4 acres to the plaintiff. This testimony is supported by the evidence of PW2, Joyce Mkwasa, daughter of the 2nd defendant and elder sister to the 1st defendant. PW2 told the court that due the dangerous situation at the Nandanga Village, they decided to relocate the 2nd defendant to Mpemba Village and bought her a house from the money gained in the sale of the 20 acres. That sale of the 20 acres was executed by Mr. George Mkwasa, the 1st defendant, her young brother after a family agreement to sale the piece of land to save their mother, the 2nd defendant. Youngson Tennison Siwale, PW3 supported the evidence that the 1st defendant, that he sold the disputed land to the plaintiff in 2008. That the sale was blessed by Nandanga Village leaders. Mr. Frankson Spaiti Mwashitete, PW4 told the court that, he was elected a street chairman since 2015. That he never received any complaint concerning the disputed farm until 2020 when TANROADS paid compensation for drawing road construction materials in the pieces of land at Nandanga. The 2nd defendant rose and claimed for compensation. That she was not among the people to be compensated. It was the plaintiff who was listed and 38 compensated. He tendered the list of names of the people who were compensated by TANROADS. It was admitted and marked PE8. Analysing the evidence given by the defendants and the plaintiff's witnesses, evidence adduced including the letter from PCCB, it is clear that the plaintiff bought the disputed farm from the 1st and 2nd defendants respectively as per their oral admission and exhibit PE1 and PE2 the sale agreements. The next ladder to climb is, does that make the plaintiff the lawful owner? Or the 2nd defendant the lawful owner? If the plaintiff is the lawful owner, how much she owns? Looking at the PE1 and PE2 the plaintiff lawfully bought the

20 and 4 acres respectively. This is supported by PE4 a letter from PCCB to the 2nd defendant copied to the plaintiff. The exhibit was tendered by the plaintiff unobjected by the defendants. At a later stage the 1st defendant used the same to build his case. He quoted a paragraph therein, which I find very useful to re-produce it here: “Mauziano halali ambayo ufuatiliaji huu umeyabaini ni yale yaliyofanyika tarehe 21 Juni, 2008 ya hekari 20 kati ya George Mkwasa na Delvina Mlay na yale ya tarehe 10 Oktoba, 2009 ya hekari 4 kati ya Delvina Mlay na Dorothy Mtawa. Na hivyo kufanya kuwa kati ya hekari 33.10 za shamba lote, hekari 24 ndizo zinazoweza kuwa za mama Delivina Mlay na hekari 9.1 mauziano yake yana utata.” 39 The letter from the PCCB was a response to the complaint raised by the 2nd defendant/plaintiff in the counter claim. In a simple translation is that, the lawful agreement which was discovered is the one of 21st June, 2008 of 20 acres between George Mkwasa and Delvina Mlay and that of 10th October, 2009 of 4 acres between Dorothy Mtawa and Delvina Mlay. Therefore, among the 33.10 of the whole farm, 24 acres belong to Delvina Mlay and 9.1 its sale is controversial. What do I gather from this investigation made by the PCCB, to be more specific, the relevance of PE4. There is a portion of the disputed land which was discovered to have been sold in a controversy. Still PE4 did not tell to whom was it sold as it did on the 20 and 4 acres. In my view, from the contents of PE4 the PCCB measured the whole farm. This was supported by PE5 the report of the commission formed by the Momba District Commissioner, which stated that the PCCB measured even the piece of land which was not sold. That PCCB wanted the whole land which was owned by Ms. Dorothy Mtawa the 2nd defendant. As a result, thereof, a confusion was born. It is clear that the plaintiff from the outset of her case, she claimed 24 acres of the disputed land. The 33.10 acres is a result of the measuring done by the PCCB which covered even the undisputed 40 piece of land. That being the case, the first issue is a shared piece of cake between the plaintiff Ms. Delvina Mlay and Ms. Dorothy Mtawa, the 2nd defendant/plaintiff in the counter claim. That view, is considered from the evidence adduced by the plaintiff, Ms. Delvina Mlay, knowing surely, if the letter will be admitted before the court will show what she bought legally and what was left to the 2nd defendant. She did not dispute on the size of the whole farm as measured and reported under PE4 that it is 33.10 acres. Also, PE5 a report from the commission appointed by the Momba District Commissioner identified the source of the dispute. That the sources include but not limited to the upgrading of the Tunduma – Ileje Road, raising of the value of the land in that area compared to the time it was sold, a third person who is financially stable behind the 2nd defendant. But the report referred to the investigation made by the PCCB, on the disputed farm which is PE4 that there was an extra one acre in the measured 4 acres in the agreement between Dorothy Mtawa and Delvina Mlay. That there was a proposal that Dorothy Mtawa the 2nd defendant to take back one acre which will include the family graves. According to PE5, the 2nd defendant, Ms. Dorothy Mtawa refused. That the plaintiff knew that the extra one acre does not belong to her. A fact which she admitted before this court. 41 In proving civil cases the court will not require the plaintiff to prove beyond reasonable doubt rather on the balance of probabilities. This was so held in the case of Paulina Samson Ndawavya vs. Theresia Thomasi Madaha (Civil Appeal No. 45 of

2017) [2019] TZCA 453 (11 December 2019) where the Court of Appeal stated that: “It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in 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.” Having seen that, it is my view, that the plaintiff has a share on the disputed farm so does the 2nd defendant. How much? According to the sale contracts PE1 and PE2 respectively, the plaintiff bought lawfully the 24 acres from the 1st and 2nd defendants. Now 33.10 acres take away 24 acres there remain 9.10 acres. Thus, the undisputed 9.10 acres belong to the 2nd defendant/plaintiff in the counter claim, Ms. Dorothy Mtawa. From the analysis I have made, the first issue is answered in the affirmative to both parties with a varying size of the part of the disputed property. To be clearer, the plaintiff is the lawful owner of the 24 acres of the disputed land and the 2nd defendant/plaintiff is the owner of 9.10 acres 42 which are not part of the disputed farm. This is evidenced by PE5 which states clear that the PCCB measured the whole of the farm which was formerly owned by the 2nd defendant. On the second issue Whether the disputed property was lawfully sold to the plaintiff by the defendants. From the analysis made and the answer to the first issue, I will not make this judgment long unnecessarily rather, will brief of this issue as much has been unfolded on the first issue. The sale agreements were not disputed by the defendants. The evidence of 1st defendant which was supported by the evidence of PW2 the first born to the 2nd defendant and sister to the 1st defendant, and the evidence of 2nd defendant/plaintiff, the disputed farm was sold lawfully to the plaintiff. The first 20 acres sold by the 1st defendant as a result of family agreement to save the life of the 2nd defendant by relocating her and treating her. The 4 acres were sold by the 2nd defendant as she testified before this court. The problem which is lingering around is, which are the lawful boundaries of the disputed farm. In my view, the first contract was witnessed by the village leaders at Nandanga, and the witnesses called by the plaintiff gave consistent evidence which was not disputed by the defendants. Also, the 2nd defendant through her evidence told the court that she sold the 4 acres 43 to the plaintiff and the same was attested by court in their locality. No doubt that, the disputed land was lawfully sold to the plaintiff by the defendants. Since in a civil suit the burden of proof is on the balance of probabilities, I am of the view that, the plaintiff has given heavier evidence than that of the defendants. See the case of Richard Kigaraba vs. Jonas Laurent & Others (Civil Appeal No. 377 of 2019) [2024] TZCA 268 (15 April 2024), the Court stated that: “It is elementary law that a person who alleges must prove what he alleges. The plaintiff alleged to have bought the disputed farm and has proved what she alleged through the witnesses called and the exhibits tendered. The witnesses’ testimonies were consistent and when cross examined they maintained that the plaintiff bought the 24 acres from the 1st and 2nd defendants and she has been using it from 2008 until 2020 when the issue of compensation by the TANROADS came into play. In their evidence 1st and 2nd defendants confessed to have sold the plaintiff the 24 acres. In that, the second issue is answered in the affirmative. I wish to make it clear that, I disregarded the evidence adduced by the plaintiff, which is

the decision of the Ward Tribunal and that of the District Land and Housing Tribunal which are PE6 and PE7 respectively. 44 The reason behind is that, the PE6 decision of the Ward Tribunal was quashed by the District Land and Housing Tribunal of Mbozi for non-joinder of the 1st defendant. Even if it declared the plaintiff the lawful owner of the disputed land, after being quashed by the superior Tribunal it had no value in this case. It just added the number of exhibits. The same applies to the District Land and Housing Tribunal's decision, it quashed the lower trial tribunal's decision. What is the impact thereof? There is no decision at all. Thus, PE6 and PE7 in my view, did not help this court in making decision rather, gave history of the dispute. In summing up, I wish to make the following observation. Both the plaintiff and the defendants agree that the dispute was reported to the PCCB by the 2nd defendant. In her testimony, the 2nd defendant who is a plaintiff in the counter claim stated that, she told the PCCB that her farm measures 60 acres. But when the PCCB measured it as a whole, they found out that it measures 33.10 acres. The plaintiff agreed that the letter from PCCB to the 2nd defendant which she was copied, shows that, the 2nd defendant before the sale of the disputed land she owned 33.10 acres. But the plaintiff has been consistent in her testimony and during cross 45 examination that, she is claiming 24 acres which, she lawfully bought from the 1st and 2nd defendants respectively. DW1 and DW2 (1st and 2nd defendants) agreed with the plaintiff that, she bought 24 acres from them. That the 1 acre which was discovered as the disputed farm was measured locally, it was agreed that it be returned to the 2nd defendant. DW1 told the court that, DW2 declined to accept that extra 1 acre in the agreement, she wanted the whole of the disputed farm. DW2/2nd defendant, in her testimony told the court that, when the plaintiff was asked if she bought the family graves she denied. Also, before this court, the plaintiff did not claim to have bought the family graves. PW2 who is a family member to the defendants, and who participated in the decision of selling the 20 acres to save the life of the 2nd defendant, told this court that, the sale was lawful. Her testimony is supported by PE4, the letter from PCCB. She further told the court that, the dispute started in 2019/2020 when the 2nd defendant heard that, the Chinese paid the plaintiff compensation in disputed area. Additionally, DW2 told the court that, when they refused to compensate her is when she started claiming that, she was not shown the boundaries of the disputed farm. All the way she is agreeing that, she sold 46 4 acres and his son, the 1st defendant sold 20 acres to the plaintiff, but she wants back the 20 acres. At the same time, she agrees that, the house in which she is living now, was bought from the money received from the sale of the 20 acres. Her issue is that the money she received from the sale is less than what the plaintiff received as compensation from the TANROADS. It is true that, the price was less as compared to the compensation, she has to consider time passed since they sold the disputed farm to the time of compensation. The sale was made in 2008 and 2009 respectively, compensation was made in 2019/2020, almost 10 years later. As PE5 stated, the value of the land has risen up compared to the time of the sale of the disputed farm. Cementing the transaction, the testimony of PW1, PW2, PW3, PW4, DW1 and DW2 supported with PE1, PE2, PE4 and PE5 clearly show that, the 24 acres were bought lawfully. The fact that, the 2nd defendant refused to accept the extra one acre returned to her by Ms.

Delvina Mlay, the plaintiff is a clear indication that, the 2nd defendant was not ready to settle the matter as advised by the PCCB. Adding on that, she stated that, the Regional Commissioner at first told her that, the disputed farm is hers, but when he went to the disputed farm and met both parties, she testified 47 that, she told the Regional Commissioner that she was not claiming the 24 acres from Delvina Mlay, then Regional Commissioner left them peacefully. The act of the 1st and 2nd defendants are agreeing that, they sold the disputed farm and if the plaintiff is claiming her 24 acres that, they have no problem with her, it is a bit strange thing. If so, why are they claiming that the disputed land was not lawfully sold. Meanwhile, they gave no evidence to prove that, neither did they disprove the evidence given by the plaintiff's witnesses. The issue of boundaries over the disputed land, has been raised only to cover the area where TANROADS is fetching road construction material. They agreed that, the 1st defendant knew the boundaries and Mr. Evarest Mlay (husband to the plaintiff) knew the boundaries and he is the one who showed the plaintiff the boundaries of the 20 acres. They agreed that, the plaintiff has been using the disputed farm since 2008 only the dispute came to existence at the wake of 2019/2020 due to the issue of compensation. I am convinced that, if not for the issue of compensation, there would have not been the issue about boundaries or fake selling of the disputed land. 48 During the trial, PE4 was accepted and used by both parties, and it stated clearly that, Ms. Delvina Mlay bought lawfully the 24 acres. The 9.10 acres, its sale agreement is controversial, but PE5 has put it very clear that, the PCCB measured even the area which is not in dispute. PE5 is a report prepared by land officers and planning officers among others in the commission appointed by the Momba District Commissioner. Since the PCCB measured even the area which is not in dispute and confirmed that Delvina Mlay, the plaintiff bought the disputed farm lawfully, it is my considered view that, the 24 acres belong the plaintiff as per the sale agreements and the customary right of occupancy. Therefore, the 9.10 acres which are not part of the disputed land belong to the 2nd defendant if she still owns them. I am afraid that, the 2nd defendant, wants to eat the cake and still have it. It is impossible, she has eaten it, then she cannot have it anymore. Therefore, the 24 acres belong to the plaintiff as the 1st and 2nd defendants supported by PW1, PW2, PW3 and PW4 testimonies adduced before this court. Therefore, this court holds that, Ms. Delvina Mlay is the lawful owner of the 24 acres located at Nandanga Village. The boundaries which were set during the sale of the 20 acres by the village leaders be intact, the 49 boundaries of the 4 acres attested by the court in the locality be respected. The disputed area has to follow the demarcation made by the village authorities when granting the customary right of occupancy. Since the customary right of occupancy covers 25 acres, one acre to be returned to Ms. Dorothy Mtawa including the family graves. Having deliberated on the first and second issues now it is time to finalise with the third issue, which states, what reliefs the parties are entitled to. Having done that much, and from the observation made the court holds that:

- (a) The plaintiff, Ms. Delvina Mlay is the lawful owner of the 24 acres as per the sale agreements.

- (b) The 1st and 2nd defendants give vacant possession of the disputed land 24 acres immediately.
- (c) The one acre exceeded in the agreement be returned to the 2nd defendant/plaintiff including the family graves.
- (d) The 9.10 acres which are not part of the disputed 24 acres be left to the lawful owner as it is not part of this case. 50
- (e) Since the report of the PCCB was not understood by the defendants hence, they had a hope that, they may claim back part of the disputed farm which is not so, I make no orders as to costs, each party to bear its own costs. It is so ordered. Right to appeal by any aggrieved party is explained. Dated at MBEYA this 24th day of July, 2024. E.L. KAWISHE JUDGE
Judgment delivered this 24th day of July, 2024 virtually, in the presence of Ms. Brigita Shao, learned Counsel plaintiff and in the presence of 1st defendant Mr. George Mkwasa and the 2nd defendant, Ms. Dorothy Mtawa. E.L. KAWISHE JUDGE 51

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