

TANZANIA / JUDGMENT

dharmesh vinesh joshi vs bg vaghela another 2012 tzhclandd 151 24 july 2012

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND CASE NO. 183
OF 2004 DHARMESH VINESH JOSHI..... PLAINTIFF VERSUS B.G.
VAGHELA..... 1st DEFENDANT NOORMOHAMED
JESSA..... 2nd DEFENDANT

JUDGMENT

B.R. MUTUNGI, J. In the present case the plaintiff Dharuesh Vinesh Joshi represented by Dr. Lamwai legal counsel proved his case through the following witnesses. To set the ball rolling the plaintiff himself (PWI) as the first witness explained that with the help of his brother in law he was able to acquire a plot at Kigamboni through a sale from one Masoud Masoud. After Masoud Masoud had assured him that he was the legal owner of the plot confirmed, they approached the street chairman who too confirmed to them that Masoud Masoud was indeed the legal owner. PWI further testified that as the land was unsurveyed he did not possess any documents in relation to the said plot. As a result a sale agreement was drafted and the two entered into a sale agreement and signed the same which ultimately was registered (Exhibit PI collectively). The agreed amount was 30,000,000/= of which PWI paid to purchase the said plot which was by then a farm. What was to be found on the piece of land were flowers and plants. On the said land there was also an old structure of which PWI had asked Masoud to continue using. It was after the sale that PWI had the piece of land surveyed and Masoud helped in the survey process that was carried out in the year 2003 under the land plan numbered 37487. PWI further narrated that the ministry of lands proceeded to issue him with the letter of offer of a right of occupancy and started paying the land rent. PWI narrated further that he could not be issued with a title deed as he later learnt that B.G. Vaghala and Noor Mohamed Jessa had lodged claims that they were legal owners of the said plot. In his knowledge PWI was certain that there was no other person in ownership of the said plot, neither was his letter of a right of occupancy revoked. What he knew is that he is the legal owner of plot 63 Block 'G' Magogoni and should be allowed to possess a title deed for the said plot. Upon cross-examination PWI explained that Masoud had several documents which he had shown him including a land rent receipts. On going through Exhibit "DI" titled "kwa yeyote anyehusika" PWI explained that the same is in relation to a plot overlooking the ocean but does not show the boundaries. PWI further clarified that by the look of

the documents some parts are hand written and others are type written words which read "Amblo amelimiliki tangu 14/10/1970". PW1 confirmed to the court that he was not tricked. Having gone through annexure D4. PW1 stated that it shows Masoud have sold the farm to one Jessa. PW1 on a further examination explained that letter dated 6/2/2006 with reference number L 090/67/90 is from the Ministry of Lands addressed B.G. Vaghala and from the said letter it would appear the said Vaghala was communicating with the Ministry in relation to surveying of a plot and was actually paying rent. He further stated that annexure 'DW3' to the written statement of defence shows the piece of land was sold by one Kadesha in 1987 to B.G. Vaghala. PW1 went on to state that the neighbor including one Mwingira had told him that he bought his piece of land from Masoud. PW1 also submitted that he had paid the village levy (exhibit P2) and upon the land being surveyed the piece of land was measured at two acres. PW1 also tendered the letter of offer dated 16/12/2003 with reference number 1024/35 as exhibit P3. PW2, Masoud Mohamed testified to the effect that he is a resident of Kigamboni and well conversant with the dispute at hand. In September 2003 the plaintiff one Joshi had approached him to buy his piece of land as he intended to build a hotel. They finally concluded a sale agreement whereby Joshi (plaintiff) paid 30,000,000/= after the village authority had confirmed that the piece of land belonged to him. These included the ten cell leader by then known as Said Jongoo. After conclusion of the sale, the plaintiff had asked him to assist in surveying of the said plot as he was leaving for Moshi where he was residing. PW2 further stated that he processed the survey and the plaintiff in December 2003 was to collect his offer. Thereafter the plaintiff had asked PW2 to stay on the said land waiting for him to process a title deed. He latter learnt from PW1 that he could not obtain the title deed as the Ministry of Land told him that the land belonged to vaghala. He was very surprised to learn this as what he knew was that vaghala owned some quarries somewhere else and did not own land in that area. PW2 denied having known one Jessa. PW3, RAJABU BUSHIRI explained that he knew Masoud (PW2) over a long time and knew that he owns land at Magogoni. PW3 further explained that he was informed by PW2 that he had sold a piece of land to one Joshi (plaintiff). PW3 explained that he has been a ten call leader since the TANU era to the time of giving his testimony. He had never heard any land dispute in the area apart from the one at hand. He also clarified that he never knew one Jessa. He further clarified that he was not Masoud's ten call leader as Masoud had his own ten cell leader. During the proceedings PW2 was re-called for further cross-examination and explained that in 1992 there was a criminal case whereby he was the complainant and said Salim Mohamed was the first accused and Bhagwanji was the second accused. He further stated that he does not remember if Ramadhani Jessa was his witness in this case. The Mala District Court Judgment.at Kivukoni of Criminal Case No. 91/92 was admitted as (Court Exhibit I). PW2 went further and admitted to have had a business deal with a company known as Badr East Africa Enterprises Ltd and they had paid him an advance of Tshs. 150,000/=. They then proceeded to the Municipal Council and they were informed that the plot was an open space from the site plan and so they could not build anything on it. PW2 was then informed by the Company People that he had to return the advance money given to him. PW4, JITESH RAJGOR testified to the effect that he is the plaintiff's brother in law as he is married to his sister. He remembers there was a time they had came to Dar es salaam to visit him and expressed their willingness and desire to own land in Kigamboni specifically a beach plot in order to build a

hotel. PW4 then went to Kigamboni and met a ten cell leader who then introduced him to Masoud who owned a plot. They then went to the Municipal Council where it was confirmed to him that the piece of land was free as it had not been allocated to anyone. PW4 further explained that PW2 the seller was given 30,000,000/= as compensation and what followed was the procedure of being granted a title. They carried out a survey and had beacons placed on the plot. They then processed for a letter of offer which they managed to secure but could not get the title deed as the Ministry of lands informed them that the defendants in this case had raised objections. He also informed the court that it was only later that they learnt that the president had revoked the titles of that area. On cross-examination this witness after going through the Government Notice No. 589 of 18/9/1998 whereby the Government was acquiring back the said land, he stated that by then PW1 had not bought the said land. On the other hand the first defendant proceeded as follows. DW1, MANILGNE GHEBARA RAWEL explained that he knew one BHAVANJI GOVIND VAGHALA who is now deceased. He further explained that the deceased had bought a piece of land from one Antony Kandela and he was a witness to the sale agreement. He also stated he was a witness to yet another sale between Vaghala and Ramadhani Abasi who was represented by Said Salum. On cross-examination this witness explained that he only witnessed the sale agreement but never visited the suit land as the signing of the sale document was done in the village offices. He also clarified that the two pieces of land bought were different. On the side of the second defendant (DW2) MOHAMED PANJU JESSA, testified to the effect that he is the owner of the disputed plot from 1991 after he bought the same from one Masoud (PW2) for 500,000/= DW2 proceeded to erect poles on the said plot only to find they had been uprooted by the first defendant (DW1) and he was criminally charged for this act. Upon determination of the case which lasted for a very long time judgment was entered in his favour (Court Exhibit I). On cross-examination DW2 explained that the first defendant had bought the piece of land in 1987 but not from the legal owner but from one Said Salum and as the result Said Salum returned the money in 1998. He further explained that in 1998 the land was repossessed by the Government and so he was no longer owning land at Kigamboni. He further explained that as he was the previous owner it follows the same after acquisition by the Government was to be given back to him. With the above summary let me now move to what was actually claimed by the plaintiff DhamlSH Vian Joshi Dr. Lamwai as against B.G. Vaghala represented by Marando, Mnyele and Company Advocate and Second defendant Noor Mohamed Jessa represented by M.A. Ismail and Company Advocates. In the plaint the plaintiff has prayed for Judgment and decree as follows:-

- i. A declaration that the plot known as plot No. 63 Block "G" Magogoni, Dar es salaam belongs to the plaintiff and the plaintiff is entitled to be registered as the owner thereof.
- i. The defendants pay the costs of and incidental to the suit. 10 ii. Any other relief (s) that the honourable court may deem fit. "To give a guideline to the suit the following issues were framed.
 - 1) Whether the allocation of the disputed plot to the plaintiff was irregular and fraudulent.
 - 2) Who is the rightful owner of the disputed plot of land.

- 3) What reliefs are the parties entitled to. In concluding on the evidence already adduced by the witnesses each of the parties in dispute submitted their written final submissions starting with the plaintiff's final submission it simply goes to show that the evidence on record was geared at showing that nobody had a registered title to the land prior to the allocation made to the plaintiff. It follows therefore that nobody could have claimed a right against the granted right. In the event therefore there was nothing illegal in the survey and allocation of the land to the plaintiff and the only conclusion is that the plaintiff is the rightful owner. More so it should be taken that as there was no counterclaim in the suit then the defendants will not be entitled to any declaration. ii The first defendant in his final written submission went ahead to underscore the fact that indeed as is on evidence he purchased the disputed land in 1987 from one Anthony Kagesa. He proceeded to state that in event the president had acquired the land then the Government was duty bound to compensate him short of which then land was to be re-allocated to him since he was the first buyer of the disputed plot anything that followed in the year 2003 was fraudulently done which included allocating land to the plaintiff as he still was the owner of the land. The sequence of events speak for themselves as he was the first buyer, then the plaintiff and second defendant have no colour of right to press any claims of ownership over the disputed land. Coming to the second defendant's final written submission his conclusion is geared towards the fact that he bought the said land from Masoud Mohamed in the year 1991 yet the same piece of land was sold to the plaintiff by the same Masoud Mohamed in the year 2003 (twelve years later). For any stretch of imagination Masoud Mohamed had nothing to pass to the plaintiff as the second defendant was still holding "a good ownership" over the plaintiff. It follows therefore the survey carried out on the disputed land was void as it was already second defendant's land. The second defendant proceeded to submit that even the first defendant has no right over the land as said Salum had no ownership of what he was selling to the first defendant and this is why he had to be re-funded his money. In conclusion he submitted that he is the legal owner of the disputed plot. Before I embark into deliberating on the merits of the evidence adduced, I would right away register my humble observation as to the conduct of this case. On admission the case filed was assigned to Kileo, J. (As she then was) and in conducting the proceedings she was assisted by two honourable assessors and she took evidence up to PW3. Upon the trial Judge's departure from the duty station the case file was re-assigned to Chinguwile, J. who proceeded from the fourth witness but did away with the assessors in the conduct of the proceedings up to the defence case where upon taking evidence of DW1. Upon her transfer I was re-assigned the file and despite noticing the absence of the honourable assessors I had to proceed in conduct of the case as the predecessor judge as I could no longer make any changes which in my opinion would do no good at that stage as the case was no longer proceeding with the assistance of the assessors. I now turn to the merits of the case itself. Starting with the second issue, as who is a rightfully/lawful occupier of plot No. 63 block G Magogoni Temeke District. The plaintiff submitted that he is the rightful owner of the plot in dispute vide letter of offer No. LD/229675/12 dated 16th day of December, 2003. He adduced that the allocation was after plaintiff had purchased the said plot from one Masoud Mohamed who held it under

customary law. 14 The plaintiff proceeded to prove that he is the lawful owner of the disputed plot by submitting that prior to being allocated the said land it had not been registered in the name of any other person and thus there was no impediment to it being allocated to him. To strengthen his case the plaintiff successfully annexed in his plaint the sale agreement entered into with receipts which were marked as exhibit P1 collectively by the court. To prove that he is the lawfully owner of the disputed plot, the plaintiff proceeded to tender in court a receipt for the payment he made to the village authorities. The said document was admitted and marked as exhibit P2. If that is not enough the letter of offer dated 16/12/2003 with reference no 1024/35 was marked and admitted as exhibit P3. The first defendant over the disputed plot submitted that he bought the suit land in 1987 from one Anthony 15 Kagesa where he was given a village title in which it was produced in court. The first defendant further testified that he bought a second piece of land from one Mzani Said the facts which according to him were celebrated with the evidence of second defendant while giving evidence in chief that he bought the said plot from the same person who sold to the first defendant. In the view of these facts the first defendant claims to be the lawful owner of the disputed plot. The first defendant did not end up here he further narrated that he is the one who purchased the suit plot early than all the litigants. He said he bought the disputed plot in 1987 while the plaintiff bought the same in the year 2003 while the second defendant bought in the year 1991. Over and above these facts the first defendant is claiming to be the lawful owner of the disputed plot. Skipping to the second defendant he submitted that he is lawful owner of the disputed plot since 1991. He said he bought the plot from one Masoud at Tshs. 500,000/= he 16 paid tax of Tshs. 50,000/=. He further added-that he remembers the witnesses who witnessed the transaction of sale and these were Mboga, said Salum and one Ramadhani. He clarified that he has a sale agreement which contained the names of the witnesses. Now the controversy as to who is the lawful owner of the disputed plot is settled in the following manner. First of all I wish to remind the parties as to the rules of evidence, as envisaged by the evidence act 1967. Section 110 provides that I quote:- “whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist” It follows that the maxim that he who alleges must proof comes into play. It is my settled finding for one to successfully pursue his case in court it is necessary to have 17 evidence to back up his claim, a party cannot just think he has a case, he must be able to prove it. I still find that to prove ownership of any property depends on the legal documents available unless such documents are impeached or any way found to be illegally obtained emphasis is mine. In measuring the evidence adduced by both parties in this case I do find that the plaintiff has successfully proved his case where he tendered documents to prove that he is the lawful owner of the disputed plot. The plaintiff tendered the sale agreement, letter of offer as well as receipts showing that he was paying rent unlike the evidence of first defendant who failed to tender the sale agreement showing that he purchased the plot in 1987. This is the mere submission from the bar because nothing has been tendered to prove that there was a transaction of sale which entitles the first defendant to be regarded as a lawful owner. The same default is shared by the second defendant who failed also to tender the sale agreement

18 between him and Masoud which purported to have been made 1991. He said he was paying fees but nothing evidenced the same. It is my settled finding that the plaintiff has successfully prove that he is the lawful owner of the disputed plot by way of documentary evidence tendered by him in the course of trial. On the strength of the evidence adduced by plaintiff am satisfied that it is true that the plaintiff right of possession of the disputed plot first accrued the moment he was offered a right of occupancy and signed his acceptance of it on 16th December, 2003. Without any doubt the law is very clear to the effect that acquisition of title to land is signified by an offer followed by an acceptance. In this case an offer was made to and accepted by plaintiff on 16th December, 2003 in respect of a parcel of land physically known to both offeror or and offeree. 19 On the strength of my finding I am of the settled view that the plaintiff has successfully proved his case that he is a lawful owner of the disputed plot. More so there being no counter-claims from the two defendants. Coming to the first issue, which is answered easily as follows, The allocation was done vide the letter of offer with reference No. LD-229675-12 dated 16th December, 2003 from land allocating authority. The one raising the allegation that there was irregularity and fraud is duty bound to prove the allegation in a manner more than on a balance of probability. Nothing has been established in line with the standard required by law neither in the evidence nor submissions by both defendants as to whether there was fraud on the part of the plaintiff or whether the title was irregularly obtained. On this point I wish to quote the holding in the East Africa case of PATEL VERSUS LARJI MAKANJI 1957 EA 34 where it was held that:- 20 "The allegation of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond something more than a mere balance of probability is required" On the strength of the evidence on record I do find neither of the defendants has attempted to prove that there was a fraud on the part of the plaintiff when he was allocated the plot. Skipping to the last issue as to what reliefs parties are entitled to, this in my settled finding is that the plaintiff is the lawful owner of plot No. 63 block G. Magogoni Temeke District and he should enjoy his right of being registered as the legal owner. In the upshot I proceed to hold the suit as heaving merits with costs. B.R. MUTUNGI JUDGE 24/7/2012 21 Read this day of 24/7/2012 in presence of 1st defendant and in absence of plaintiff and 2nd defendant dully notified. B.R. MUTUNGI JUDGE 24/7/2012 22

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