

TANZANIA / JUDGMENT

MASHAKA ABDALLAH VS ABDALLAH 1

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IN THE HIGH COURT OF THE UNITED RE PUBLIC OF TANZANIA SHINYANGA SUB REGISTRY AT SHINYANGA LAND CASE NO. 20230524000500381 (ORIGINAL JURISDICTION) 1.MASHAKA ABDALLAHA (Administrator of Estates of Mhoja Juma (the deceased) 2.JULIUS BONIFACE MAGUMBA (The administrator of Estates of BonifacePLAINTIFFS Magumba Gisema (the deceased) Versus 1.BARIADI TOWN COUNCIL

2. THE MINISTRY OF HOME AFFAIRS
3. THE ATTORNEY GENERALDEFENDANTS
4. THE REGISTRAR OF TITLES
5. COMMISSIONER FOR LANDS

JUDGMENT

9th October & 29th November 2024 F.H. MAHIMBALI, J The plaintiffs' claims against defendants is for a declaration that 18 acres of land located at Somanda area, in Bariadi Township bordered by the land currently owned by the Roman Catholic, KKKT Church, the Somanda Police Staffs' residential building and the Bariadi – Lamadi Road which form part of the estates of the Late Mhoja Juma and Boniface 1 Magumba Gisema, its acquisition by the 2nd defendant as per procession done by the 1st 5th and 4th defendants was unlawful and thus the title deeds granted on it in favour of the 2nd defendant are illegal. It was further alleged that the plaintiffs being legal representatives of the Late Mhoja Juma and Boniface Magumba Gisema who died intestate in 1975 and 1983 respectively leaving behind among others, the land measuring 10 and 8 acres respectively that in total form 18 acres which are subject of the suit land. Currently, the said suit land forms part of the 2nd defendant's land as per procession done by the 1st 5th and 4th defendants and consequently granted her with the rights of occupancy (title deeds). It is the plaintiffs' claims that the suit land was in ownership by their deceased parents making a total of 44 acres of land. Out of which, the 26 acres are not in dispute. In a sense that, out love and affection a total of 12 acres was granted to the Roman Catholic and KKKT Churches (4 and 8 acres respectively) for holding religious rituals. That six acres were transferred to the 2nd defendant to construct staffs' residential buildings while the 8 acres were transferred to Mashaka Abdallah for plaintiff's uses. The defendants under auspice of the first defendant unlawfully and unjustifiably exploited the 18 acres of land without appreciating their interest and rights of the plaintiffs.

Further it was stated that the Late 2 Mhoja Juma and Boniface Magumba Gisema owned the suit land from their fore fathers namely Lugandu in 1939 and Gisema in 1968 respectively. The Plaintiffs' grandfathers had initially cleared the virgin land in 1968. The plaintiffs' grandfathers are among the first persons to settle in an area now known as Bariadi Town; by then the whole area was full of bushes, forests sheltering wild animals. Basing on the above facts, the plaintiffs claim for the judgement and decree against the defendants as follows;

- i. Declaration that the 18 acres of land located at Somanda Bariadi Township -Simiyun Region is part and parcel of the estates of the late Mhoja Juma and Boniface Magumba Gisema. ii. The declaration that the acquisition of the suit land is a nullity thus the purported title deed in favour of the 2 nd defendant in respect to the suit land be revoked. iii. General damages at the Court's discretion, and iv. Costs of the suit. It is an elementary principle of law that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts do exist. 3 The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side. Thus, it is trite law that a burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person. That notwithstanding, in civil matters, a fact is said to be proved, if its existence is established by a preponderance of probability (see section 3(2) (b), 110 and 112 of the Tanzanian Evidence Act, Cap 6, R.E 2022). A mere saying in court is not a proof of a fact and thus does not accord a litigant with a legal right but only when he or she establishes the existence of the said facts by a preponderance of probability. Only a party with heavier evidence is to be pronounced a winner for a legal claim before a court of law. At the hearing of this case, the plaintiffs were represented by Mr. Julius Mushobozi assisted by Mr. Emmanuel Paul Butamo both learned advocates while Mr. Musa Mpogole and Maganiko Msabi learned Stated Attorneys appeared on behalf of the defendants. In determining the suit, three issues for court's deliberation were framed namely;
1. Who is the lawful owner of the suit land between the Plaintiff (Administrators of estates) the 2nd Defendant, 4
2. Whether the grant of certificate of occupancy (tittle deed) in favour of the 2nd Defendant was lawful, and
3. To what relief(s) are the parties entitled. The plaintiffs' case had a total of four witnesses namely; Mashaka Abdallah (PW1), Julius Boniface Mgumba (PW2), Nyanga Nzuli Nyanga (PW3) and Dotto Msikula Makungu Lupuzi (PW4). For the defendants' case there were three witnesses namely; Nelson Leonard Titu (DW1), Ramadhani Maboki Sayi (DW2) and Atupokile Astony Mwandumbya (DW3). PW1 and PW2 are the current administrators of the estates of the late Mhoja Juma who died intestate in 1975 and the late Boniface Magumba Gisema who died in 1983. That the deceased parents had obtained the said land from their fore fathers Juma Lugandu and Gisema Mburamatale. They described the suit land as follows: East is bordered with the main road Bariadi -Lamadi, South is bordered with Roman

Catholic & KKKT, West is bordered with Forest farm of Roman Catholic and Bariadi sec. school, North is bordered with police Forest Residence quarters. As administrators, they tendered exhibits P.1 and P. 15 (letters of administration of the said estates). They testified how their parents and themselves have been occupying and using the said land for agricultural, 5 pastoral uses, etc all the time and how in the early-1990s they had struggled to get the said land surveyed and issued with the certificates of titles but in vain as per exhibits P2. P3, P4, P5, P6, P7, P8, P9, P10, P11, P12 and P16). Until recently (May 2021) when the 1st defendant had issued instructions prohibiting them from further uses of the disputed land. When all this was in vain, they had decided to institute this suit. In essence, as per documentation, the police quarters are in plot No. 608 Block Somanda. Part of thei land is said not surveyed as the responsible officers have not yet done so. But later it has been revealed that part of their land falls in plot no. 609 & 610, Block Somanda. Out of 18 acres about 8 acres fall into plots 609 & 610 Block Somanda. The remaining 10 acres which they believe is not yet surveyed, borders with Roman Catholic Church. Scanning the plaintiffs' testimony, it is clear that out of the claimed 18 acres, about 10 acres are the one belonging to the late Mhoja Juma in which PW1 is his administrator. The remaining 8 acres (which forms plots no. 609 & 610) is the one belonging to the deceased Boniface Magumba Gisema whose estate is now administered by Julius Boniface Magumba (PW2). 6 Their land (10 acres) is the property of the late Mhoja Juma. The said land was originally under use /ownership of the late Juma Lugandu since 1908. Later in 1930's, he gave it to his son Mhoja Juma. By that time, it was 32 acres. At all the time, it was being used for food crops and cash crops. Mhoja Juma had been using it since 1930s until 1975 when he died and left it to his family. By the time Mhoja Juma died in 1975, the land size remained 10 acres. The other 22 acres had been given to various institutions and PW1. Police were given 6 acres, 8 acres were given to KKKT, 8 acres were given to himself. The area given to police is now plot No. 608. That was in 1975 prior to his death. After the death of the late Mhoja Juma, his remaining land (10 acres) has been under full control of his surviving family. By the time of his demise in 1975, the overseer of his properties was his elder daughter Felister Mhoja. The similar story is obtained from PW2 who alleged that just after the death of their father Mzee Gisema who had obtained that land from his fore father Gisema Mburamatare was under the overseer of his widow one Solina. 7 They thus prayed for the suit land be declared theirs for the betterment of their family which consists several heirs. They also prayed for the said unsurveyed land be surveyed and be allocated to the family and part of the land forming plot 609 and 610 Block Somanda be declared lawfully owned by the family of Mhoja Juma which is to be distributed to his heirs. The total land is approximated to be worth 850,000,000/=. That the said suit land was acquired by the government, the duo plaintiffs averred that it is not true as it has always remained their land. They thus urged this Court to nullify ownership to the grant of their land in respect of plots no. 609 and 610 and instead be registered in the names of Mzee Mhoja Juma to form part of their estate and the other land (believed not surveyed) be declared the lawful property of the second plaintiff as administrator of the estate of the late Mzee Gisema. On the side of the defendants' case DW1 – Nelson Leonard Titus, a land surveyor – Bariadi Town Council, stated that the land in

dispute is surveyed land and has granted rights of occupancy. In land survey, there are two types: formalization of unsurveyed land and normal survey. The dispute involves indigenous who claim to be original owners and the government institute – Tanzania Police Force who also claim to be owners of it. The said indigenous in claim are Solina Boniface Mgumba and Felister 8 Mhoja Juma. As per documents in their office (the certificate of occupancy), the said suit land belongs to the Tanzania Police Force. Other documents are land survey dated 1978 and approved in 1978. The suit land involves 19 acres consisting of four plots. These are known as Plot no. 608, 609, 610 and open space which is between 609 and 610. The open space is not numbered. What makes the said suit land to belong to government institute, is the map title/survey map title: Survey of government Plots and medium residential plots (No.1 – 61). Other plots were not numbered. With the police land, it was not numbered though in his understanding it falls within the government plots. So far, there are police quarters, and other government offices such as Government Hospital, Bariadi District Council. The survey plan is dated 18th Feb 1978. The survey of the village land, is done in two ways: one by surveying the village land itself and then is granted its certificate of registration by the relevant authority. Second is by **uhaulishwaji** i.e taking part of the village land to the general land for it to be granted right of occupancy to the applicants. Normally, the application of land ownership, is accompanied by the following credentials: proof of ownership of the said land by the applicants, the approval of the village assembly by the 9 minutes' meeting on ownership. With P.2 exhibit (Survey application by the Felister), could not be acted upon by the government because it missed the necessary accompanying documents, such as: minutes' meeting of the relevant authority – Village Assembly, names of the attendants of the said meeting. Thus, these exhibits P.2 and P.4 were not satisfactory for the grant of the said application as the same missed essential accompanying documents to accord its application. There ought to be detailed explanations from the village authority to introduce the applicants on the said application. Circumstantially, on the suit premises, it is doubtful if the said land was a bare land, because first it is surrounded by various institutions and that the said area remains undeveloped. Had it been under indigenous uses as claimed, there ought to have been evidence of human uses until when the alleged ban was issued in 2020. He added that the land survey is dated 1975 and 1978. They have been owning it all the time until 2018 without any disturbance. With the entry into force of the 5th Government regime, there was a movement that all the government institutions with land, they should own their lands legally by grant of certificates following intrusion by many citizens against the government lands. In consideration of the fact that at one time the government owned lands were being invaded, the same had to be 10 surveyed and certificate of titles issued. With this suit land – amounting 19 acres, police like many other institutions had commenced the official process of registering its land. So, by 2019, there had been amendments in the survey plan to issue survey plots. These two persons: Felister Mhoja and Solina Boniface Magumba, he saw them first in the dispute settlement in 2019. In the said meeting, the agenda was dispute settlement on the complaint by Solina and Felister. The said meeting was convened by the Asst. Commissioner for Lands – Simiyu. There were several attendants including representative from RAS Simiyu, DAS – Bariadi, Bariadi Town

Council, himself, Nelson Leonard Titus, Head of Planning – Rashid Denisy Rashid, Council members from Somanda Street, Representative from Police Simiyu, Representative from RC Church – Bariadi, KKKT, and other citizens – natives, the family of Solina and Felister including these two plaintiffs. The said meeting discussed about the proof of ownership of the said land. On the side of Bariadi Town Council had provided the survey plan of the area. On the side of the complainants, they had provided their documents in which they seemed to be insufficient. After that meeting, the minutes of the meeting was prepared and the list of the attendants. The report of the meeting (minutes) was sent to the Ministry for Lands as it was the one which had directed the convening of the meeting for the complaints lodged by these 11 plaintiffs. The conclusion of the said meeting is found in the minutes' meeting that police had relied on the survey plan of the area in which it established that police were the owners of it and the complainants had nothing to establish on the said ownership. The said survey plot established that all the surrounding neighbours had already developed their land save police force. The minutes' meeting dated 16/12/2019 with heading: MUHTASARI WA KIKAO CHA KUTATUA MGOGORO WA ARDHI BAINA YA BI. SOLINA MAGUMBA NA FELISTER MHOJA DHIDI YA JESHI LA POLISI BARIADI, KANISA KATOLIKI NA KANISA LA KILUTHERI BARIADI WITH REF NO. LD/SYZ//55/06 was admitted as exhibit D.1. The police plots are in survey plan number E 18 28/17 of 1975 which was approved in 1978. It is the registered plan number 17150. Survey of Government Offices Medium Density Residential Plots 1-61 Somanda area with plots 604,605,606, 608 -610, 611 Block Somanda dated 10th July 1975 as registered plan No. 17150 was admitted as exhibit D2 of the case. He further contended that by survey plan being approved, means the said survey plan has passed the district level and approved by the Ministry of Lands. Its legal status is almost enforceable by the law as it is the valid document. As per the registered plan, the police plots are four: 12 Plot no. 608, 609, 610, open space. All are within Block Somanda – urban area. With Plot No. 609 also is within Block Somanda – Urban area. Its density is 4.668 acres. It has four beacons: OA820, OA821, OA822, OA819). The next plot is 610. It has five beacons: OA818, OA823, OA825, OA824 and OA817. Its density size is 4.73 acres. The open space is within the police area. It has four beacons: OA819, OA822, OA823, OA818. The open space its land size is not indicated but the total land area (size) is 19 acres (608,609,610 and open space). As per the registered plan survey, the KKKT Church and Catholic Church is not part of this survey. They are not part of this survey plan simply because it was not part of government plots. This survey was specifically for government plots in the area. As to the claims by the plaintiffs, that Plot no. 609 and 610 and the open space were surveyed in one process E 18 28/17 of 1975 which was approved in 1978. When was cross examined DW1 testified that prior to the survey plan of 1975, he did not know who were the original owners. DW2 – Ramadhani Maboki Sayi stated that the said area was theirs – belonging to Mzee Maboki Sayi who is his father. He had been using it since then. DW2 came to know it in 1975 when he was 13 years old. The said land was at Nyamhimbi but also known as Ujenzi area (government office). It was 30 acres' land size by foot measurement. By that time 13 (1975), he was at Nyamhimbi with his father. Later, there was operation vijiji, their land was bordering as follows: Northern side their farm extending up to the main road (Lamadi road). On Eastern side it

was just a bush land - meeting it with river Bariadi. On western side, there was also a bush land. On their southern part there was Kipara, Nyanzamao. The said Mhoja Juma was on eastern part. The distance from Mhoja Juma to their land was about 100 meters. It was through the operation vijiji scheme whereby the government was taking people together for villagelization process. The government through DIVISION officers from Bariadi District, had taken all the area there. He got all this from his father during his lifetime. They used the said area for livestock as well. The government had just taken those areas for villagelization. He later saw, construction of buildings at the said area. By the time of construction, he used to see police officers. Following the operation vijiji, they were re- allocated to another area. The said construction was done in their land. He knew Mhoja Juma in the 1970 as he was just a peasant. He had a child Nyanzara and his wife Mwanatondo. The distance from where Mzee Mhoja and where Police had built is about two football pitch. With Boniface Mgumba Gisema, he was their neighbour and that he was religious leader of the Catholic church but Mr. Boniface had no farm. The disputed land is 14 now the government's area as previously owned by Mabhoki Sayi and Mhoja Juma. DW3 – Atupokile Astony Mwandumbya, amplified that she is a land officer stationed at Bariadi Town Council. In 2020, had prepared documents for right of occupancy in favour of Tanzania Police Force. It was in respect of three plots: Plot No. 608, Block Samanda, Plot No. 609 Block Somanda and Plot No. 610 Block Somanda all at Bariadi Town. The procedure of granting right of occupancy was as follows: there was an application form (Form No.19) from land office which was to be filled. After they had been satisfied with the details of the applicants, his or her nationality, Postal address, Land size, names and number of plots, site plan, survey plan of the area and signature of the applicants and the land officer. The said form was in a prescribed form (Form No.19), which bears all the necessary information. Each application contained three forms. Thus, with their three plots, they had filled nine forms for plots no. 608, 609 and 610 Block Somanda – Bariadi Town. Form No.19 for Plot No. 608 Block Somanda was admitted as exhibit D. 3 & Form No. 19 for Plot No. 609 Block Somanda was admitted as exhibit D. 4. As per their office satisfaction, the owner is Tanzania Police Force. They were satisfied so as per applicant's declaration in Form No. 19 and 15 also as per Survey Plan. After the satisfaction of all this, they issued control number for payment. After they had paid the necessary fees, they had paid so and dully acknowledged. Thereafter, the provisional right of occupancy certificate and deed plan were prepared and signed by the owner. The said acknowledgment form describes plot number and block number, owner, and the details of the payments done. As these plots concern the government institution/institutions, the place of photograph is annexed with the office seal. The Permanent Secretary had then paid for Plots No. 608, 609 and 610 Block Somanda, Bariadi. The acknowledgment of payment form for Plot no. 608 Block Somanda for Sqm 30270 dated 14/05/2020 was admitted as exhibit D.5 and the acknowledgement of payment form for Plot no. 609 Block Somanda for Sqm 18971 dated 14th May 2020 was admitted as exhibit D.6. The Land survey plan of these plots was prepared in 1975 and approved in 1978. The said survey plan was for government plots which had government institutions in which some of them were for police residential plots. The deed plan was dated 2020. The deed plan can be prepared at any time as the case may

be, depending as to when the said need arises. 16 As to why the right of occupancy was issued in 2020, while the survey plan is of 1975, DW3 stated that after the said survey plan, everything was fine. But following land trespass against government plots being escalate, it was then directed that all government premises must be processed to acquire their respective certificate of occupancy. The Certified Certificate of Occupancy and their deed plans (Land Form 23) for Plot No. 608 was admitted as Exhibit D.7, for Plot no. 609 was admitted as exhibit D.8 and for Plot No. 610 was admitted as exhibit D.9. With Land Form No. 19 for plot no 610, also bears the same particulars as stated in Land Forms No.19 for plots no. 608 and 609. The Land Form No. 19 for Plot No. 610, Block Somanda was admitted and marked exhibit D. 10. With village land, the process of granting right of occupancy to the applicant were as follows: An application is sent to the village council, then Village Assembly convened, after the approval of the Village Assembly, the VEO informs the District Land Office with the said application together with the Village Assembly minutes, then site visit to satisfy on the boundaries and the neighbours. On satisfaction, form no. 18 will be filled by the neighbours (north, south, east and west). After the said form is filled by the neighbours and the VEO and Chairman, then the District Land Officer will prepare a customary right of occupancy. For a 17 village land that is inherited, the process is the same save the fact that there is an additional information by the clan meeting or and court that he is the heir. The process is the same even to those occupying land in the village by history, if the issue of granting right of occupancy comes into play, this process of application and approval must be strictly complied with. To him P.2 and P.4 exhibits had not complied with the application for the grant of customary right of occupancy. There were no necessary documents accompanying the said application such as minutes of the village assembly. Exhibit P3, was an introduction letter from *Mtaa* government signed by Chairperson going to the Ex. Director Bariadi for survey and grant of customary right of occupancy. In his view by 2018, Somanda was declared to be urban town. So, its land had transferred from village land to general land. If it is general land, the one mandated with the survey and planning is the ED or City Director. So, the applicants ought to have applied directly to the ED for being granted right of occupancy of their owned land. With the current claims in respect of Plot No. 608, 609 and 610 Block Somanda, as per office documentations, the Police had complied with all the legal process of owning the said plots of land. As per legal information 18 available, the registered owner of the said land plots (608, 609 and 610) is the Permanent Secretary Ministry of Home Affairs for Tanzania Police Force. After the closure of the testimonies by both parties, parties opted to resort by filing final written submission. The plaintiffs' written submission had fortified on how the suit land came into possession by their elderly fathers. How the suit land was segmented and gifted to various institutions and how various attempts were invoked to formalize the suit land via the overseers and administrators of the said estates. Reference was made to exhibits P2, P3 to show efforts undertaken to formalize the ownership of the said land but in vain. They refuted the reliance by the defendants that since there are certificates of occupancy issued to the 2nd defendant then the suit land belongs to her. To them, the survey made was in contravention of the law which requires natives to be notified for the survey before land is undertaken for

that making reference to section 8 of the Survey Act. Thus, the survey conducted in 1978 was null and void equally the subsequent certificate of occupancy granted. Lastly, they concluded that the suit land belongs to the late Mhoja Juma and Boniface Mgumba Gisema.

19 On the side of the defendants, had submitted that the suit land belongs to the second defendant, in accordance with exhibits D2, D3, D4 and D10. To them, PW1 and PW2 failed to prove on how their late fathers acquired the suit land contrary to the principles cherished in the case of; Farah Mohamed vs Fatuma Abdallah [1992] TLR 205. They had also pressed that, since the suit land being registered property of the second defendant then this court be embodied to declare so. Meanwhile, they contended that exhibits by plaintiff were nothing with proof of the suit land and the alleged efforts to formalise land made by the plaintiffs were not fatefully for being insufficiently provided. Whereas, they had submitted that since the second defendant complied with legal procedures of acquiring Land in pursuant to section 25 of the land Act, then is solemnly owner of the suit land and the plaintiffs be evicted. Having heard both parties on merit, I have now to determine this suit based on evidence and the legal position cherishing ownership of land. In my determination of the matter, I shall be guided by the following principles of law. One, is that in civil cases, the burden of proof lies on the person who alleges anything in his favour as founded in section 110 of the Evidence Act. Two, is that the burden of proof envisaged above is 20 on the balance of probabilities (See 3(2) b, of the Tanzania Evidence Act) and as stated in various decisions, including Anthony Masanga v. Penina Mama Mgesi and Another, Civil Appeal No. 118 of 2014 and Hamza Byarumshengo v. Fulgencia Manyi and 4 Others, Civil Appeal No. 33 of 2017 (both unreported). Starting with the first issue as “Who is the lawful owner of the suit land between the Plaintiffs (Administrators of estates) and the 2nd Defendant”. It has been evidenced by PW1& PW2 that the suit land was owned by the late Mhoja Juma who died in 1975 who also inherited it from his deceased father Juma Lugandu. The suit land is 10 acres, which originally the said land was owned by the late Juma Lugandu since 1908 by clearing the bush land. Later in 1930’s, he gave it to his son Mhoja Juma. By that time, it was 32 acres. At all the time, it was being used for food crops and cash crops. Mhoja Juma had been using it since 1930s until 1975 when he died and left it to his family. By the time Mhoja Juma died in 1975, the land size remained 10 acres. The other 22 acres had been given to various institutions and PW1. Police were given 6 acres, 8 acres were given to KKKKT, 8 acres were given to PW1. The area given to police is now plot No. 608. That was in 1975 prior to his death. After the death of the late Mhoja Juma, his remaining land (10 acres) has been 21 under full control of his surviving family. The said plot is described as follows: East is bordered with the main road Bariadi -Lamadi, South is bordered with Roman Catholic & KKKKT, West is bordered with Forest farm of Roman Catholic and Bariadi sec. school, North is bordered with police Forest Residence quarters. Though the said land is stated as not surveyed as per PW1’s knowledge but later, it has been revealed that part of their land falls in plot no. 609 & 610, Block Somanda. Out of 18 acres about 8 acres fall into plots 609 & 610 Block Somanda. The remaining 10 acres which he believes is unsurveyed land borders with Roman catholic. In the claimed 18 acres about 10 acres is the one belonging to the late Mhoja Juma and the remaining 8 acres belongs to the late Boniface Magumba Gisema.

Further, it was revealed that the late Boniface Magumba Gisema had died in 1983. The late Boniface Magumba Gisema had obtained the said land from his late father – Gisema Mburamatale, meaning that he was given by his father – Gisema Mburamatale. That was in 1965. The said Gisema Mburamatale had also cleared a bush land. That was in 1908. From 1965 after being given, the late Boniface Magumba Gisema continued using it until his demise in 1983. From 1983, the land was being used by his family under the watch of Solina Boniface Magumba as per 22 clan meeting's directives. That was in 1984. From that year 1983, the family members of the late Boniface Magumba continued using that land from then until 2020. The paradigm shift was opposed by the defence evidence arguing that the suit land was acquired by the government via operation vijiji, making the suit land being of the government and the plaintiffs were re- allocated to another place in 1975 (See DW2's testimony). Being the case, several developments were done including surveying and issuing land plan in the year of 1978. In the mid of 2020, people including the plaintiffs trespassed the suit land claiming to be theirs. This made the defendants to apply for certificate of occupancy. This was in accordance with testimonies of DW1 and DW3. With testimony of DW2 that the suit land was theirs – belonging to Mzee Maboki Sayi who is his father. He knew it in 1975 when he was 13 years old. The said land was at Nyamhimbi but also known as Ujenzi area (government office). In the year 1975, there was operation vijiji. The government was taking people together for villagelization process. From the evidence gathered above, it is therefore undisputed that the suit land was owned by the late Mhoja Juma and Boniface Magumba 23 Gisema. Though DW2 had admitted that the late Mhoja Juma owned a piece of land over there, but to him the late Boniface Magumba Gisema had no farm. Throughout the mouth of PW3, PW4 who were resident and indigenous over the suit land stated that Boniface had inherited from his father Gisema Mburamatale the suit and Mhoja Juma had taken over from Juma. Interestingly, while DW2 admitting the late Juma Mhoja had possessed a piece of land, DW1 and DW3 stated that what assures them that the suit land belong to the second defendant is existence of Certificate of Right of Occupancy over the suit land and Land survey plan approved in 1978 (See exhibits D2, D3). To them since 1975 the land had been in possession of the first defendant to date. It is in 2020 the plaintiffs trespassed the suit land. With the piece of evidence from the defendants, in my considered view such evidence had not casted the question as to how the first defendant obtained the suit land. Who is to be believed as to whether DW2 who testified that the suit land previously was owned by his father, when operation vijiji came into place they were forced to move from the suit land and the same was assigned to the second defendant, who 24 ultimately developed the land or we should only trust that the suit land was allocated to the second defendant and granted with Certificate of Right of Occupancy as testified by DW1 and DW3. The second defendant was burdened to prove on how she acquired the suit land, thus led her to be granted with certificate of occupancy. In absence of this, it is hard to prove that the suit land belongs to her. Mindful the claims of land need to be strictly proved, equally like other claims of special damages. By the way testimony of DW2 was a hearsay evidence, which this Court hesitates to rely on it as the principles of law dictates. Notably, through these ways a person may acquire land ; by allocation, clearing of virgin forest,

purchase, and gift. See *Rashid bin Ali vs Bakari bin Kayanda*, (1941) Governor's Appeal No.31, *Silanga Kimenanga vs Mevongori Mosoni*, 1962, James R.Wand Fimbo G.M, pp. 299 -300, *Leonance Mutalindwa vs. Mariadina Edward* (1987) TZHC 23 (10 August 1987).

Bartholomew Ndyanabo vs Petronida Ndyamukama, (1968) HCD 339. In the case at hand the plaintiffs had chronologically testified on how the suit land came into their possession, but the defendants I see 25 there is a broken chain on how the suit land became into their possession by the second defendant. That is established only by detailing ways used to acquire such land. In upshot of proof of these ways, a person's claims over the land guarantees his right and his claims renders meaningless. The plaintiffs' evidence is straight on how the land had acquired by their late fathers via clearing the virgin land and inheritance. Several attempts to formularise possession of land were barred by many unnecessary obstacles from early 1990s. See exhibits P2, P3, P4, P6, P7, P8 and P11. How come that in 2020 they are treated as trespassers? Taking into board that prior, the suit land was village land thus was transformed to general land as contended by DW1 and DW3. However, there is no government notice to the effect as the law requires for transformation of such village land to general land, these are merely words from the dock. Now, in the case at hand the suit property is a surveyed land and has been registered pursuant to the provisions of the Land Registration Act [Cap.334 RE 2019]. The question of who is the owner of a registered piece of land can easily be answered by the definition of the word "owner" 26 as provided under section 2 of the Land Registration Act. The word "owner" has been defined thus:

- "...in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered." (Emphasis added) Upon registration, the person whose name has been entered into the register is issued with the certificate of title pursuant to section 35 of the Land Registration Act, as evidence of ownership. It provides thus: "The owner of an estate in any parcel shall be entitled to receive a certificate of title under the seal of the certificate land registry in respect thereof, showing the subsisting memorials in the land register relating thereto..." According to 33(1) (b) or (c) of the Land Registration Act [Cap 334 R.E. 2019] (The Land Registration Act) provides that: 33.-(1) The owner of any estate shall, except in case of fraud, hold the same free from all estates and interests whatsoever, other than- 27
- (a) N/A
- b) the interest of any person in possession of the land whose interest is not registrable under the provisions of this Act;
- (c) any rights subsisting under any adverse possession or by reason of any law of prescription;
- (d) to (g) not applicable. From the above quoted provisions, registration is of no doubt a prima facie proof that the one whose name is in the land register and who is in a possession of a certificate of title is the owner of the piece of land to which such person is registered. This position was taken by this Court in *Salum Mateyo v. Mohamed Mateyo*, [1987] T.L.R 111,

where Mroso, J stated thus; proof of ownership is by one whose name is registered. Additionally, the Court of Appeal in Nack Esther Nyange vs Mihayo Marijani Wilmore and another, Civil Appeal No.1017 of 2019 held that; "...the certificate of Title is a conclusive proof of ownership of land." 28 The valid question to ask is whether, can anyone in place of certificate of title claim ownership of land against the holder of it? This is not the first time the Court of law is faced with the similar position. The above holding positions notwithstanding, the decision of the Court of Appeal of Tanzania in Attorney General Vs Lohay Akonaay and Joseph Lohay, Civil Appeal No.31 of (1994) where the Court observed the following: Customary or deemed rights of occupancy in land though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution of the United Republic of Tanzania. The deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution. Similar position was also taken by the same Court in Rashid Baranyisa Vs Hussein Ally (2001) TLR 471, where it was stated: The mere act of designating the area a trading center and surveying it did not have the effect of extinguishing the holder 29 of his deemed right of occupancy over the land and reducing him into a squatter. Borrowing a leaf from the above decision, even if the alleged survey and grant of right of occupancy by the first and fifth defendants would have been proved (of which it is not the case in the instant appeal), the same would have not as by itself extinguished the plaintiffs' rights in the suit land as they established lawful and continuous possession and occupation over the suit land. In the fine, it has to be noted that a customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy, as per section 18 (1) of the Village Land Act Cap 114 RE 2002. Since prior to the alleged allocation of the disputed land, the plaintiffs were already in long use and occupation of the disputed piece of land; the defendants' latter intervention over the same land cannot override the former's rights them having acquired and lived there. In the absence of their actual acquisition of the said land by the government, the survey plan by itself is not an automatic legal instrument depriving the citizens' rights over land use and occupation. The survey plan and process of 1974 was not automatically a lawful process to extinguish the original owner of land of their vested rights over it. Government does not own land by survey process but by land acquisition or also by clearing 30 virgin land as it is to the normal citizens. To hold otherwise is to license land grabbing by the process of survey. Therefore, the process of issuing of the granted right of occupancy to the 2nd defendant as done by the 1st 5th and 3rd defendants was not legally justified in the absence of full, fair, just, equitable and prompt compensation proclaimed and recognised by our Land laws (the Land Act and the Village Land Act). Since government works on papers, it was very important for the defendants to establish how they acquired that land from the plaintiffs/ other *wananchi*. A mere survey process is not by itself a full legal authority that the said land was acquired. It is a mere plan on what will be if that is implemented. Since the said survey is dated 1970s and that the plaintiffs have established active use and occupation prior to the 1970s, as by priority principle, the plaintiffs have established better long and continuous title than the 1st and 2nd defendants. In the absence of such evidence that the defendants were occupants of the registered land owned by the

plaintiffs, it would entail a conclusion that the plaintiffs are authentic owners of the entire disputed plots free from all estates and interests whatsoever. A proper authority to 31 justify that at the time the land was being granted to the 2nd defendant did not have any subsisting third-party interests in terms of section 33(1) (b) or (c) of the Land Registration Act, above is the authority that granted it to the 2nd defendant (See Tanzania Railways Corporation (TRC) vs Gbp T. Ltd (Civil Appeal 218 of 2020) [2021] TZCA 198 (7 May 2021). However, in the current case, that authority failed to discharge its duty well. Ownership of land is a question of fact. Therefore, it must be strictly established. There must be sufficient evidence to prove ownership strictly on historical basis without a chronological chain break. One cannot just get up and claim ownership of land without establishing how it came into his possession. Where the historical basis and subsequent documentation is unexplainable, it is hard to believe lawfulness of the land ownership. In the current case, weighing the scales between two contesting parties, the scales tilt much to the plaintiffs than the defendants. In essence, I know of no law, that a mere survey plan is conclusive proof of granting someone with a right of ownership or a government instrument of land acquisition. 32 Conclusively, the first issue should not detain me so much, I must therefore conclude that the suit land in totality belongs to Mhoja Juma and Boniface Magumba Giseme (the deceased). With the second issue that "Whether the grant of certificate of occupancy (tittle deed) in favour of the 2nd Defendant was lawful" Much has been discussed in issue No. 1, procedures of granting right of occupancy are lawful only when are made to the lawful owner of the land, apart from that, the grant of certificate of occupancy is unlawful. In the instance case, despite the evidence detailed by DW1 and DW3 on how the procedures were taken for grant of Certificate of Occupancy to the second defendant, yet all efforts made become meaningless as the same were done to the land which is not hers. Taking into consideration that the same were exercised without knowledge of the complaints. Luckily, even the law does not prohibit the conduct over the land without involving the natives. I think this is the problem. Therefore, with the evidence on record, I must therefore hold that since natives were not involved in grant of right of Occupancy and that since the grant was made to a land which did not belong to the grantee, then the grant of certificate of occupancy was unlawful. I thus declare that the granting of 33 right of occupancy on land known as Plot No. 609 and 610 and the open space to the second defendant without a proper acquisition, was unlawful and unjustified. To what relief(s) are the parties entitled . As well detailed when discussing issues No.1, the reliefs equitable to the plaintiffs is recovery of the suit land. Alternatively, plaintiffs are claiming monetary compensation over 850,000,000/=. The computation is unjustifiable and has no good basis. It being specific damage, ought to have been strictly established. As to the best way forward and for the public interests, I would first urge the defendants (1st, and 2nd defendants) to acquire the said land legally by involving government valuers and do just, fair, equitable and prompt compensation to the plaintiffs' land over plot 609, 610 Block Somanda and the said open space (not numbered). Should this option considered difficult by the 2nd defendant, I order immediate surrender of the land to the plaintiffs and the issued Certificates of Titles in favour of the second defendant is varied and in its place direct the Registrar of Titles and the Commissioner for Lands to register the plaintiffs as owners of the

respective lands over Plot No. 609, 610 and the open space to the extent of each one's interests. I say so basing on our National Land Policy which requires that all persons exercising powers under the land laws amongst 34 other things have regard in regulating the amount of land that any one person or corporate body may occupy or use; see Mulbadaw Village Council and 67 Others vs. National Agricultural and food Corporation, (1984) TLR 15. Taking into consideration that it has been alleged the second defendant had done some improvements even over the suit land, thus deserve more considerations. A time of three months from today is sufficient for the defendants to make a proper decision before eviction is ordered to be carried against her. The plaintiffs' case succeeds to the extent explained above. As to the nature of the case, I make no orders as to costs. It is so ordered. Right to appeal fully explained to any aggrieved party. DATED at SHINYANGA this 29th November, 2024. F.H. Mahimbali Judge 35

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