

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND CASE NO. 152 OF 2017

ANNA ALPHONCE KASEMBEPLAINTIFF

VERSUS

DORA KAWAWA (Administratrix of

Estates of late Secilius Edward Fussi - Deceased)**1ST DEFENDANT**

MODEST DAVID CHONAPI MAPUNDA**2ND DEFENDANT**

ELLY GIFT S. FUSI**3RD DEFENDANT**

BRICKHOUSE COMPANY LTD**4TH DEFENDANT**

JONES SECILIUS EDWARD FUSI**5TH DEFENDANT**

JUDGMENT

4 & 11/12/2020

RUMANYIKA, J.

With respect to 2. 5 acres of land now Plot numbers 2108, 2109 and 2111 located at Mbezi, Kilongawima area Kinondoni District (the disputed plots), against Dora Kawawa Fusi (as the Administratrix of the estate of the Late Secilius Edward Fusi), Modestos David Chonapi Mapunda, Elly Gift Secilius Fusi, Brickhouse Company Ltd and Jones Secilius Edward Fusi (the 1st and 2nd, 3rd, 4th and 5th defendants)

respectively, Anna Alhonce Kasembe (the plaintiff) prayed for declaratory orders:- **(1)** That she was the lawful owner of the disputed plots **(2)** That the agreements between the 1st and 2nd defendants also between the 3rd and 4th defendants were illegal. In that regard also, the plaintiff prayed for permanent injunction against the defendants, eviction order, general damages and costs.

Mr. Rajabu Mrindoko and Ms. Stella Simkoko, learned counsel appeared for the plaintiff. Mr. Michael, learned counsel appeared for the 1st, 3rd, 4th and 5th defendants. The 2nd defendant enjoyed services of Mr. Sosten Mbedule, learned counsel.

Here the issues are: **(1)** Between plaintiff and defendant who is the lawful owner of the disputed land **(2)** Reliefs the parties are entitled to.

Pw1, Anna Alphonse Kasembe (41) stated that from time in memorial the disputed plots belonged to the late father one Alphonse Kasembe (died on 08/06/2004). That it was not until as late as 13/04/2000 when in consideration of natural love and affection the late father gave it to her on application the late father having had it been allocated to him by Kunduchi Mtongani Ujamaa Village on 15/04/1975 (copies of the application letter, receipt for fees paid and a deed of gift-Exh. "P1") collectively but the defendants encroached it also claiming titles and in the course they demolished her huts and destroyed crops namely some cashew nut, coconut, mango trees and so forth (photographs – Exh. "P2") collectively. That therein between, but the 1st defendant's late husband having confessed to have mistakenly invaded and surveyed one of the disputed

plots No. 2110 L. Mbezi they agreed each other to and exchanged it say 3 years later with Plot No. 689 Block "C" Mtoni Kijichi (copy of the deed of agreement-Exh. "P3") nevertheless the plaintiff sold it later. That if anything, she was, during the survey not involved or in any way compensated.

Pw2, Juma Kitundu Mbogo (69) stated that by way of gift from father and he witnessed it, the deceased plaintiff's father a friend who owned the disputed 2.5 acres of land he gave it to her where they grew some cashew nut, coconut trees etc. (Exh."P1" dully identified) that no neighbors witnessed it and, like the plaintiff's father he had applied also was allocated 3.0 acres.

Pw3, Tatu Maskini (50) she stated that from the time in memorial she was neighbor and the plaintiffs' family friend at Mbezi Kilongawima that vero, Juliana, Anna, Agnes survivor daughters of the late Alphonse who gave her the disputed land as gift. But she did not tell Pw3 before if the land had been surveyed or at any given point in time the plaintiff and 1st defendant having had exchanged portion of the disputed plot for the other one located at Mtoni Kijichi.

Pw4, Juma Kasala (72) stated that the plaintiff's late father, a carvings maker he was both a brother and friend. That among others he witnessed the late father in writing but it appears in consideration of natural love and affection giving her the disputed 2.5 acres of land, where they grew some coconut, cashew nut, mango and guava trees also they

and two houses there. That he had not even been aware of the plaintiff and 1st defendant between them having exchanged plots. That is all.

Upon closure of the prosecution case, Messrs Michael and S. Mbedule, learned counsel for the defendants successfully prayed for a short adjournment therefore by consent to 04/12/2020 for hearing of the defence case. However, but contrary to what has agreeably schedule, when the case was called on 04/12/2020, the learned counsel prayed for adjournment for three (3) main reasons:-

1. Whereas Mr. Michael, Advocate informed the court that as the key witness 1st defendant had not arrived from Arusha, the other nine (9) equally intended defence witnesses could not have testified until then because it was only the said key witness who was capable of laying foundation of the case;
2. On his part, Mr. S. Mbedule, advocate informed the court
 - (a) That they were reliably informed that there is between but secretly one Thomas Uiso had purchased the disputed land from the Plaintiff therefore the former need to be joined and impleaded as such
 - (b) That Kinondoni Municipality Council alleged land allocators needed be joined and impleaded along with the commissioner for lands, the Attorney General and the Registrar of Titles. The Court be pleased to vacate the scheduling orders dated on 26/10/2020 with a view to allowing one amend the written statement of defence/counter claim. We so pray under order VI Rule 17

of the Civil Procedure Code Cap. 33 R. E. 2019. The learned counsel further prayed and submitted.

Mr. Mrindoko, learned counsel also is on record having resisted adjournment for reasons that:-

1. That was the 1st defendant really for the time being missing, no explanation was given for whereabouts of the other nine (9) defence witnesses that it was but delaying tactics
2. That therein between one Thomas Ousi may or may have not purchased the disputed land yes, but this one was no proper forum but if anything in the end the former may wish to institute objection proceedings much as having had been raised this court was long ago done with the issue of joinder of the Commissioner for lands and the like. That contrary to provisions of Order 1 Rule of the code the prayer for adjournment only intended to defeat the proceedings and one one's interest was at stake (Case of Abdi , Mpoto vs. Chief Athur Mtoni, Civil Appeal No. 75 of 2017 Court of Appeal of Tanzania (unreported). Pursuant to reasons and my ruling of 04/12/2020 I dismissed the prayer for adjournment. Hence only to such extent the exparte judgment.

Indeed with effect from 15.4.1975 or sometimes around there, on application the plaintiff's deceased father may have been allocated by Mtongani Ujamaa Village authorities of the time, therefore lawfully he owned the disputed 2½ acres of land fine, however, with a view to establishing the plaintiff's **locus standi** it left much to be desired if really

on 13/04/2000 the late father gave it to her or she had been a mere licensee thereof given the title: **MAKABIDHIANO YA SHAMBA NA VIBANDA MBEZI KILONGAWIMA (Exh. "P1")**. However, its contents will clearly show that the deceased father gave it to her and or he only entrusted her the shamba. It would have been a different scenario if expressly the deceased said that may be, in consideration of natural love and affection he had gave it to her.

If, just in case of the 1st scenario the plaintiff was a mere licensee, from the very start the latter had no legal mandate on that one to sue or being sued as there is no way this court could assume role of the deceased father and simply give the disputed land to the plaintiff. Courts of law do not pass titles they only declare titles once a licensee always a licensee. If anything, the plaintiff would have sued only in that capacity or as the case may be an administratrix of the estate in which case therefore, the possibilities of the deceased father himself having had so disposed the land it could not have been ruled out much as one Veronica, Juliana and Agness, according to Pw3 the survivor daughters they are not parties to this case and they didn't testify, leave alone chances of the plaintiff having had by passed them.

Moreover, like it was afterthought, with respect to exchange of the disputed plots (No. 2110 Block "L" Mbezi and No. 689 Block "C" Mtoni Kijichi between the plaintiff and the 1st defendant and having had been executed it say three (3) good years later, it left much to be desired. It means therefore that with respect to the remaining plots, the plaintiff and the 1st defendants similarly were long ago also done, chances were not

eliminated because as it stands, plots 2108,2109,2110 and 2111 Block "L" Mbezi were sequentially surveyed and probably the respective letters of allocation issued.

With respect to all defendants, the plaintiff has, on balance of probabilities not proved her case. It is dismissed with costs. It is so ordered.

Right of Appeal Explained.


S. M. RUMANYIKA
JUDGE
11/12/2020

The judgment delivered under my hand and seal of the court in chambers this 11/12/2020 in the presence of Mr. Edward Magayane, learned counsel who was holding brief for Stella Simkoko, learned counsel for the plaintiff and Mr. Nazario Michael, learned counsel for the 1st, 3rd, 4th and 5th defendants.



A handwritten signature in blue ink, appearing to read "S. H. Simfukwe".

S. H. SIMFUKWE
DEPUTY REGISTRAR
11/12/2020