

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

LAND CASE NO. 107 OF 2011

TANZANIA OXYGEN LIMITED.....PLAINTIFF

VERSUS

WILLIAM ISMAIL MOSHA.....DEFENDANT

Date of last order: **14/12/2017**

Date of Judgment: **16/02/2018**

JUDGMENT

I. ARUFANI, J.

The plaintiff is praying the court to enter judgment and decree against the defendant for a declaration that, the plaintiff is the owner of Plot No. 14 Wazo Hill, Kinondoni District, in Dar es Salaam Region, an order to evict the defendant from the suit land, the defendant to be ordered to pay the plaintiff one million shillings per month as a loss of mesne profit from 11th day of September, 2009 when the plot was ready for use by the plaintiff up to the date of judgment, perpetual injunction to restrain the defendant from trespassing into the land and costs of the suit.

The gist of this matter as can be grasped from the plaint is to the effect that, the plaintiff is averring to be the owner of the above mentioned plot of land and stated to have purchased the same from one Michael Kamilius Mtui in 1997. The plaintiff complained to have failed to develop and utilize the land for the intended business because of trespass done by the defendant to the land. The plaintiff prayed the court to grant them the relief stated hereinabove. On the other side the defendant stated in the written statement of defence to be the lawful purchaser of the plot of land in dispute from Michael Kamilius Mtui who was the previous registered owner and stated to have purchased the same on 31st day of July, 2002. The defendant prayed the plaintiff's claims to be dismissed with costs and the Registrar of Land to be ordered to revoke and cancel the plaintiff as the owner of the suit property and proceed with transfer of the land to the defendant and declare him as the legal owner of the plot of land in dispute.

During the hearing of the matter the plaintiff was represented by Mr. Samson Mbamba, learned advocate and assisted by Miss Aziza Msangi learned advocate. On the other hand the defendant was represented by Mr. Albert

Msando, learned advocate and he was assisted by Mr. Ally Hamza, learned advocate. The plaintiff called two witnesses to prove the claims and the defendant called three witnesses to refute the same.

Sirilli Sekamaganga, (PW1) told the court that, he is an employee of the plaintiff as a principal legal Assistant. He said their claims before this court and against the defendant is about the Plot of Land No. 14 situated at Wazo Hill within Kinondoni District in Dar es Salaam Region which they purchased from Michael Kamilius Mtui trading as Paro Investment (1991) Company. He said to have purchased the land in dispute on 30th day of July, 1997 at the consideration of TZS 10,500,000/= and the sale agreement of the land was admitted in the case as an evidence and marked exhibit P1. After signing the sale agreement they also signed a deed of transfer of the ownership of the land from the seller to the purchaser on the same day and the same was admitted in the case as an evidence and marked exhibit P2.

PW1 told the court that, after signing exhibit P1 and P2 they filed the same in the Ministry of Land to seek for the consent of change of ownership of the land from the seller to the purchaser and the consent was granted. The transfer

was effected on 11th day of September, 2009 as endorsed in the certificate of occupancy No. 45978 of the land which was admitted in the case as evidence and marked exhibit P3. PW1 tendered to the court a valuation report used to transfer the ownership of the land to them and the same was admitted in the case as an evidence and marked exhibit P4.

He said that, they have sued the defendant in this court as he trespassed onto the land in dispute which they purchased for the purposes of installing the LPG project. He said they have failed to implement the project because the land they purchased for that purposes from Michael Kamilius Mtui was invaded by the defendant who is alleging to have purchased the same form Michael Kamilius Mtui. PW1 said that, they don't know if the land was resold to the defendant by Michael Kamilius Mtui and what they know is that, they purchased the same and the ownership of the land was transferred to them in 2009. He testified further that, the land as indicated in exhibit P3 is for Industrial purpose only and its size is 1.104 Hectare. He prayed the court to grant the reliefs sought in the plaint.

When PW1 was cross examined by the counsel for the defendant he said that, when the plaintiff purchased the

land in 1997 he had already been employed by the plaintiff. He said that, after purchasing the land they made a follow up of the transfer of ownership of the land to the plaintiff and that was done in 2009. He said is the one signed the reply to the written statement of defence and he saw the receipt of payment made to the police relating to the loss of certificate of occupancy or title deed with No. 10708650 dated 2nd day of March, 2000 and the police report dated 31st day of March, 2000 attached to the WSD of the defendant. He also said to have seen the letter from the Registrar of Title concerning the loss of the Title deed together with the Government Gazette. He also said to have seen the receipt of the official search done by the defendant but he had not adduced any evidence to refute the said documentary evidence.

He said further that, when they purchased the land it was an empty land but in 2002 they found the land had been cultivated by the defendant. He said he has not produced to the court the certificate of clearance of the capital gain for purposes of effecting the transfer of the ownership of the land to them. He said that, though they purchased the land at a consideration of TZS 10,500,000/= but when the

transfer was effected in 2009 its value was TZS 55,000,000/=. He said to have heard the rumors at the Ministry of Land that, the title deed of the land had been stolen when he was in the process of registering the transfer of ownership of the land.

Godfrey Mfalomagoha, (PW2) told the court is a Land Officer employed by the Ministry of Lands, Housing and Human Settlement Development. He said among the duties he performed in his employment is to represent the Commissioner for Land in different cases where is summoned to give evidence. He said the commissioner for Land was summoned to give evidence in the instant matter and he instructed him to come to the court on his behalf. He testified that, according to the file of their office, the land in dispute was initially allocated to Michael Kamilius Mtui t/a Paro Investment (1991) Company through the letter of offer with Ref. No. LD/178023/5/DW dated 21st day November, 1995. After the issuance of the letter of offer the plaintiff was issued with certificate of title No. 45978.

He said that, later on Michael Kamilius Mtui sold the land to the plaintiff and the ownership of the land was transferred to the plaintiff after the Commissioner for land

consented the transfer to be effected on 12th day of April, 2002 and said up to now the plaintiff is the owner of the land. He stated that, the documents sent to the Commissioner for land for transfer of ownership of the land to the plaintiff is the original certificate of occupancy, sale agreement (Form No. 38), transfer deed (Form No. 30) and valuation report (Form No. 29). He said he don't know if the Commissioner for land has been sued in any court in relation to any dispute emanating from the plot of land transferred to the plaintiff.

PW2 said that, on 1st day of March, 2007 they received documents from F. M. Awadhi for transferring the ownership of the land from Michael Kamilius Mtui to the defendant. He said after seeing the land had already been sold to the plaintiff in 1997 they failed to proceed with the transfer of ownership sought by the defendant to be effected in 2007. He said that, one of the reason caused them to fail to process the consent of transfer of ownership of the land to the defendant is after seeing that, while the initial owner of the land in dispute was Michael Kamilius Mtui t/a Paro Investment (1991) Company but the sale agreement of the land in dispute submitted to the Commissioner for land by

F. M. Awadhi for transfer of the ownership of the land to the defendant had the name of Michael Kamilius Mtui without any indication that is trading as Paro Investment (1991) Company.

When PW2 was cross examined by the counsel for the defendant he said he don't have the copy of the consent given by the commissioner for land for the transfer of the ownership of the land from Michael Kamilius Mtui to the Plaintiff or even the copy of the dispatch signed by the commissioner for land sending the consent for transfer of the ownership to the Registrar of Title. He also said he don't have anything to show the certificate of occupancy was misplaced or lost and said the person who was supposed to publish the loss of the certificate of title is the Registrar of Title. He said the Registrar of Title published the loss of the Certificate of Title and after failing to see anybody claiming to have right on the same he issued a duplicate of the Certificate of Title.

He continued to say that, on 20th day of April, 2007 they wrote a letter with Ref. No. LD/178023/32/TNN to Michael Kamilius Mtui informing him the Registrar of Title had failed to give consent of transferring the ownership of the land he

had sought because the required fees had not been paid and the ownership of the land had already been transferred to the plaintiff from 2002. He said one of the documents sent to the Commissioner for land seeking for transfer of the land to the defendant had the photograph of the defendant. He added that, when consent of transferring the ownership of the land from Michael Kamilius Mtui to the plaintiff was granted the tax which was paid was Stamp Duty of TZS 420,000/= which was paid on 10th day of May, 2002, Registration Fees of TZS 27,000/= and another TZS 200 which he failed to read properly in the land file was for what purpose. He said the capital gain tax is paid after the commissioner gives his consent and calculated all the taxes which are supposed to be paid.

The defendant called Silverious Peter Qorro (DW1) who said is employed by the Ministry of Lands Housing and Human Settlement Development as legal officer working in the department of the Registrar of Titles. He told the court that, According to their record the Plot of land No. 14, Wazo Hill, Kinondoni District in Dar es Salaam Region was initially allocated to Michael Kamilius Mtui t/a Paro Investment (1991) Company on 1st day of August, 1996 under the

ownership of 99 years from 1995. He said on 13th day of April, 2000 the office of the Registrar of Title received an application for issuance of another copy of the certificate of title to the plot of land on the ground that, the original certificate of title had been lost.

He said the process was followed and the duplicate copy of the certificate of title of the plot in dispute was issued to Michael Kamilius Mtui. He said on 11th day of September, 2009 their office received an application for transferring the ownership of the land in dispute to the plaintiff and application was registered and given title No. 124795. He said according to the record of their office the owner of the plot of land in dispute is the plaintiff. He said further that, according to his understanding, if the duplicate certificate of occupancy is issued after the original certificate is lost and later on the original is found the duplicate is returned to the Registrar of title and is cancelled. He tendered to the court the copy of the Government Gazette No. 252 of 2000 dated 10th day of May, 2000 and the same was received by the court for the purpose of taking judicial notice of the same.

The defendant, William Ismail Mosha (DW2) told the court that, he knows Michael Kamilius Mtui and he

purchased the plot of land in dispute from him on 31st day of July, 2002 and after purchasing the same he entered onto the land immediately. He told the court that, they signed the sale agreement of the land before an advocate and they had all the documents relating to the said land like duplicate of the certificate of title, search document, police loss report showing the original certificate had been lost and copy of Tanzania Government Gazette publicizing the loss of the original certificate of title of the land in dispute.

He said all the above stated documents were handed to advocate Deogratuis William Ringia, (DW3) so that he can process the transfer of the ownership of the land to him but the same has never been effected to date and he don't know the reasons for the failure. When cross examined by the counsel for the plaintiff he said he paid all the money for paying the required taxes and fees to DW3 but he don't remember how much taxes was supposed to be paid. He said that, although is not using the land but he has fenced it and for security purposes he has built thereon a small house for a watchman. He said he don't know if the plaintiff has been prevented to enter onto the land. He also said he don't know if he was supposed to seek permit of building the fence and

a small house for a watchman on the plot from the town plan authority.

DW3 told the court that, the defendant was their client when he was working in a legal firm called Nyange, Ringia and Company Advocates. He told the court that, according to his recollection the defendant took to their office his documents so that he can assist him to take them to the Registrar of Title for the purpose of transferring the ownership of the land property which was in the ownership of someone Mtui to him. He said the documents given to him by the defendant were Land Form, Valuation report and certified copy of the Title deed and said to have presented the said documents to the Registrar of Title. He said that, after submitting the documents to the Registrar of Title he found there was a big land rent which had not been paid and told one of the condition for transferring the ownership of the land was for the land rent to be paid first.

DW3 told the court that, after the defendant negotiated and paid the land rent the documents were submitted to the Registrar of Title for transfer of the ownership of the land to the defendant. DW3 told the court that, he don't know if the Commissioner for Land granted consent for the transfer of

ownership of the land to the defendant. He said to have been told by the defendant that, the certified copy of the title deed was given to him by the seller of the land in dispute. He said further that, the defendant was making a follow up of the consent from the Commissioner for Land himself and when he tried to make a follow up of the consent he was told to wait. He told the court that, in 2009 he departed from their legal firm before the consent being granted and went for studies in Netherland and left the file of the defendant to Mr. Nyange for further follow up of the transfer of ownership of the land to the defendant. He said that, when he came back in 2010 he found the company had already demised and said that, currently the plaintiff is his retained client.

After hearing the evidence from both sides the counsel for the parties prayed to be given chance of filing the final submission and despite the fact that the prayer was granted it is only the counsel for the defendant filed in court the final submission for his client and no submission was filed in court by the counsel for the plaintiff. In principal the counsel for the defendant stated in his submission that, the transfer of ownership of the land to the plaintiff is illegal. He prayed the court to dismiss the suit with costs and ordered the

Registrar to revoke and cancel the plaintiff's ownership to the land and proceed to transfer the ownership of the land to the defendant. The issues framed for determination in this matter are as follows:-

1. Who is the rightful owner of the suit premises?
2. To what reliefs are the parties entitled?

Starting with the first issue the court has carefully considered the rival evidence from both sides and come to the finding that, both the plaintiff and the defendant are maintaining to have purchased the land in dispute from Michael Kamilius Mtui on different dates. While the plaintiff is averring to have purchased the land in dispute on 30th day of July, 1997, the defendant is averring to have purchased the same land on 31st day of July, 2002. Although both parties stated to have purchased the land in dispute from Michael Kamilius Mtui but no party dared to call him to testify before the court as to whom among the parties in the matter at hand he sold the land in dispute and the court was not told why the parties refrained from calling him. To the view of this court the said seller of the plot in dispute to the parties in this matter would have been very important witness to the matter as he would have enabled the court to

detect easily the rightful owner of the plot of land in dispute and if there is any fraud, who actually committed the same.

Despite the fact that the vendor of the land in dispute was not called to testify before the court but the evidence of the plaintiff and his witness analyzed hereinabove shows that, after the plaintiff purchased the land they applied to the Ministry of Land for transfer of the ownership of the land from the vendor to them and the ownership was transferred to the plaintiff in 2009. On the other hand the evidence received by this court from the defendant and his witnesses shows that, although after the defendant purchased the land, he applied to the Ministry of Land for the transfer of ownership of the land to him but to date the transfer has not been effected.

Although the defendant told the court he don't know why the Commissioner for land has not transferred the ownership of the land to him but DW3 told the court that, one of the reason caused the Commissioner for land to fail to give consent of transferring the ownership of the land to the defendant is non-payment of big land rent. Although DW3 said non-payment of the land rent was the cause of failure of the consent of transferring the ownership of the

land to the defendant to be granted but DW2 said he paid all the required taxes and fees for transfer of the ownership through DW3. In addition to that, the counsel for the defendant stated in his submission that, after negotiation the defendant paid the land rent of TZS 1,577,340/=.

This shows the cause of failure to transfer the ownership of the land to the defendant is not non-payment of the land rent as stated by DW3. The cause of failure to transfer the ownership of the land to the defendant was stated by PW2 as when he was cross examined by the counsel for the defendant he said that, the Commissioner for Land wrote a letter dated 20th day of April, 2007 with Ref No. LD/178023/32/TNN to the defendant informing him the consent of transferring the ownership of the land to him was not granted because the required fees had not been paid and Michael Kamilius Mtui had already transferred the ownership of the land to the plaintiff.

The court has considered the submission of the counsel for the defendant that there were some illegalities in the transfer of ownership of the land to the plaintiff as when he cross examined PW1 he said some documents like land forms No. 29, 30 and 35 were not submitted to the

Commissioner for Land for transfer of ownership of the land to the plaintiff. With due respect to the learned counsel for the defendant, the court has failed to see anywhere in the record of the matter the learned counsel for the defendant cross examined PW1 and PW1 said the documents mentioned above were not submitted to the Commissioner for land for transfer of the ownership of the land to the plaintiff. To the contrary the court has found it is PW2 who said he don't see the said documents in the file of their office.

The court has found that, although PW2 said he don't see the mentioned documents in the file of their office but that is not enough to establish the documents were not submitted to the Commissioner for land. The court has found PW1 stated clearly in his evidence in chief that, the documents submitted to the Ministry of Land for consent and transfer of the ownership of the land to the plaintiff were original title deed, land form No. 38 which is sale agreement, land form No. 30, land Form No. 29, valuation report and proof of citizenship of the purchaser of the land. To the view of this court if the said documents were not submitted to the Ministry of Land the consent and subsequent transfer of the ownership of the land to the plaintiff would have not been

effected. In the premises the court has failed to see any merit in the argument of the learned counsel for the defendant.

The counsel for the defendant raised another argument in his submission that, the Commissioner for land approved the transfer of title to the plaintiff and the Registrar of Title proceeded to register the transfer while the title deed had already been cancelled. The court has found that, it is true that section 38 (1) of the Land Registration Act Cap 334 R.E 2002 provides that, where a certificate of title has been lost or destroyed the Registrar of title may issue a new certificate to replace the lost one and subsection two provides that, if the previously issued certificate of title is found the Registrar of title is required to cancel the previous one.

The court has found that, although it was stated in the case at hand that the Registrar of Title issued a duplicate of the certificate of Title to the previous owner of the land in dispute after being satisfied the original certificate had been lost but the said duplicate was not tendered to the court as evidence so that it can be examined by the court. To the contrary what is annexed to the written statement of defence is the certified copy of the certificate of occupancy and the same was also not tendered to the court as an exhibit. To

the view of this court, the circumstances of this case where is stated the original certificate had not been lost but was in the Ministry of Land after being submitted there by the plaintiff while seeking for the transfer of ownership of the land to them it cannot be said if there is any cancellation of the original certificate of title was done properly.

The court has also arrived to the above view after seeing there is no any evidence adduced before this court to establish the previous owner of the land, Michael Kamilius Mtui did not sale the land in dispute to the plaintiff as indicated in the evidence adduced before this court. To the contrary the court has found the evidence adduced by DW2 and DW3 shows that, although the defendant said to have purchased the land from the previous owner but his application for consent of transferring the ownership of the land to him has not been granted by the responsible authority to date. This makes the court to fail understand how it can be said the defendant who stated to have purchased the land in dispute five years after the plaintiff purchased the same is a rightful owner of the land.

The learned counsel for the defendant raised another argument in his submission that, the transfer of the

ownership of the land to the plaintiff was illegal as capital gain was not paid. The court has considered the same and find it has no merit because as stated by PW1 and PW2 the plaintiff paid all the taxes and fees they were required to pay. PW2 stated clearly that, the record in the file of their office shows that, on 10th day of May, 2002 the plaintiff paid TZS 420,200/= as a stamp Duty, Registration fees at the tune of TZS 27,000/= and another TZS 200/= was paid on the same date though he don't know was for what purpose. In addition to that PW1 stated in his evidence clearly that, the capital gain tax alleged to have not been paid was paid and were given certificate of clearance for payment of the same. To the view of this court and as I said earlier there was no tax or fees which was not paid by the plaintiff because if there was any tax or fees which was not paid the ownership of the land would have not been transferred to the plaintiff.

Since there is no dispute that the land was sold first to the plaintiff and the vendor issued the original certificate of title to the plaintiff and as stated by PW1 was submitted to the Commissioner for Land for consent of the transfer of the ownership of the land to the plaintiff and there is no even a scintilla evidence or even allegation to show the sale of the

land in dispute to the plaintiff was procured by fraud it cannot be said the transfer of ownership of the land to the plaintiff was illegal as there is nothing to justify the illegalities alleged by the counsel for the defendant. The above finding make the court to come to the settled finding that, the plaintiff is the rightful owner of the land in dispute.

Coming to the second issue which is about the reliefs the parties are entitled the court has found that, as the court has found the plaintiff is the rightful owner of the land in dispute the plaintiff is entitled to a declaration that, it is the rightful owner of the plot in dispute and the defendant is supposed to vacate from the land in dispute forthwith. As for the claim of payment of TZS 1,000,000/= per month as the loss of mesne profit for not using the land from 2009 when the plaintiff was ready to use the same, the court has found there is no evidence adduced by the plaintiff to establish they would have get the stated profit. That being the specific damage, the plaintiff was supposed to be proved the same to the standard required by the law to enable the court to grant the same (see the holding of the Court of Appeal of Tanzania in the case of **Masolele General Agencies V. African Inland Church Tanzania** [1994] TLR 192). As there is no evidence

to prove the same the court has failed to see any basis upon which the claimed mesne profit can be granted.

In the final result the court is hereby entering judgment and decree in favour of the plaintiff and against the defendant as follows:- (1) the plaintiff is declared the rightful owner of the land in Plot No 14, Wazo Hill Dar es Salaam, (2) the defendant is ordered to vacate forthwith from the land in dispute, (3) the court is granting perpetual injunction to restrain the defendant to trespass into the land in dispute and (4) the plaintiff is awarded costs of the suit. It is so ordered.

Dated at Dar es Salaam this 16th day of February, 2018


I. ARUFANI
JUDGE
16/ 02/2018