

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
LAND CASE NO.155 OF 2021**

**BAHIYYA A. KIBOLA (Administratrix of the Estate of the late TAANISAH  
TAMBWE AREND)..... PLAINTIFF**

***VERSUS***

**ASSISTANT COMMISSIONER FOR LANDS,  
DAR ES SALAAM ZONE.....1<sup>ST</sup> DEFENDANT  
DIRECTOR OF SURVEY AND MAPPING  
DAR ES SALAAM ZONE..... 2<sup>ND</sup> DEFENDANT  
HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT  
GERALD PETER SWAI.....4<sup>TH</sup> DEFENDANT  
PARMO MATHEW MENDULLO (As an Administrator of  
the Estate of the late SIRVEL DICK MENDULLO).....5<sup>TH</sup> DEFENDANT  
ALFRED MULOKOZI.....6<sup>TH</sup> DEFENDANT  
LUCAS SIMON MONGI.....7<sup>TH</sup> DEFENDANT  
JIMMY PAUL NTOBI.....8<sup>TH</sup> DEFENDANT  
THOMAS RAYMOND MKINGA.....9<sup>TH</sup> DEFENDANT**

**BY WAY OF COUNTER CLAIM**

**GERALD PETER SWAI.....1<sup>ST</sup> PLAINTIFF**

**PARMO MATHEW MENDULLO (As an Administrator of**



the Estate of the late SIRVEL DICK MENDULLO) .....2<sup>ND</sup> PLAINTIFF

**VERSUS**

**BAHIYYA A. KIBOLA (Administratrix of the Estate of the late TAANISAH  
TAMBWE AREND) .....DEFENDANT**

**JUDGMENT**

*7<sup>th</sup> December 2023 & 8<sup>th</sup> February 2023*

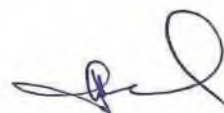
**L. HEMED, J.**

The Plaintiff **BAHIYYA A. KIBOLA** is the administratrix of the estate of the late **TAANISAH TAMBWE AREND**. One of the properties under her administration is the suit landed property known as Plot No.68 at Hananasif in Dar es Salaam covering the area of forty-two thousand two hundred and thirty square feet (42,230 sqf). The Plaintiff knocked the gates of this Court suing the 4<sup>th</sup> up to 9<sup>th</sup> defendants for trespass into the suit land and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants as necessary parties to the matter at hand. In her Complaint, the Plaintiff seeks for the following orders against the defendants: -

*"a) For a declaratory order that the re-surveying of landed properties forming party of the said plot No. 68 at Hananasif and designated it as Plot No.411,412,413 and Plot No.414 at Block 40 by the 2<sup>nd</sup> Defendant is illegal(herein referred to as the "suit Property") is lawfully owned by the plaintiff.*



- b) For declaratory order that the allocations of the areas designated as Plots No.411, 412,413 and Plot No.414 of Block 40 forming part of Plot No.68 to Gerald Peter Swai, Sirvel Dick Mendullo, Alfred Mulokozi, Lucas Simon Mongi and Jimmy Paul Ntobi by the 1<sup>st</sup> Defendant amount to double allocation of the landed property
- c) That the overlapping survey plan with reference No. D'571/43 and with a registered Plan No.30361 be declared void.
- d) That the survey plan No. D'571 and with registered plan No.7560 of the year 1978 be declared to take precedence and applied.
- e) For declaration order that the occupation of the landed properties forming part of Plot No.68 at Hananasif by Gerald Peter Swai, Sirvel Dick Mendullo, Alfred Mulokozi, Lucas Simon Mongi, Jimmy Paul Ntobi and Thomas Raymond Mkinga amount to trespass to the Plaintiff's land.
- f) For an eviction order against the 4<sup>th</sup> to 9<sup>th</sup> defendants and/or their agents assignees or any person occupying the land forming part of the suit properties from the defendants and the demolition of all the building constructed thereat.
- g) For perpetual injunction to restrain the defendants and /or their agents, assignees or unlawful occupiers occupying the defendants from further trespassing onto the suit properties and the land forming part of plot No.68 at Hananasif.



- h) For general damages at the assessment by the Court.*
- i) Costs of the suits."*

The defendants disputed all the claims. In their joint written statement of defence, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants averred that the 4<sup>th</sup> to 9<sup>th</sup> defendants are lawful owners of the plots allocated to them as per the legal survey plan which was conducted to generate the plots which were allocated to them. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 9<sup>th</sup> defendants, **GERALD PETER SWAI, PARMO MATHEW MEDULO, ALFRED MULOKOZI** and **THOMAS RAYMOND MKINGA**, through their written statement of defence claimed that their plots were demarcated long before 1970 and that, their houses were built by the National Housing Corporation (NHC) before 1974. According to them, the pieces of land they own were sold to them between 1995 and 1998 by the NHC and they have been living therein to date.

The 4<sup>th</sup> and 5<sup>th</sup> defendants proceeded to raise a counter claim against the Plaintiff praying for the following reliefs: -

- (a) A declaratory order that Plots No.411 and 412 at Block 40, Hananasif Area Kinondoni Municipality do not trespass, override or form any part of Plot No.68 Block 40 at Hananasif Area Kinondoni Municipal.(sic)*



- (b) *A declaratory order that any acts of the Defendant that touches or and enterferes with the demarcation of Plot No.411 and 412 at Block 40, Hananasif Area Kinondoni Municipal that were in place since the 1970's amounts to trespass to the Plaintiff's said plots. (sic)*
- (c) *A declaratory order that the Defendant's act of constructing a building on the right of easement should be availed to the Plaintiffs for proper passage. (sic)*
- (d) *A declaratory order that the ongoing construction carried out by the Defendant on the right of easement/path used by the Plaintiffs in the 1970's to 2021 which has blocked the said easement/path is improper and unlawful.*
- (e) *A declaratory order that the right of easement/path that is currently been used by the Plaintiffs should not be blocked by any ongoing construction of the Defendant and should be left as a passage for the Plaintiffs.*
- (f) *A perpetual injunction to restrain the Defendants and or her agents from occupying and dealing with the right of easement and any part of the Plaintiffs' Plots No.411 and*



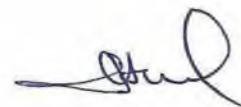
*412 at Block 40, Hananasif Area Kinondoni  
Municipal.*

*(g) Costs of the suit."*

The 7<sup>th</sup> Defendant, **LUCAS SIMONI MONGI** also in his written statement of defence disputed the plaintiff's claim. He averred to be the lawful owner of Plot No.414 Block 40, Hananasif Area. On his part, the 8<sup>th</sup> Defendant one **JIMMY PAUL NTOBI** disputed the claims of the Plaintiff and stated to be the lawful owner of Plot No. 626 Block 40, Kinondoni, Hananasif Area.

The attempt to mediate the parties done by the Mediation Centre of the Judiciary failed. Therefore, on 8<sup>th</sup> May 2023 parties appeared before me for final pre-trial conference where the following issues were framed to guide the trial of the matter: -

1. Whether the creation of plots No.411,412, 413, 414, and 626 of Block 40 Hananasif Area was lawful.
2. Whether plots 411,412, 413, 414 and 626 Block 40 were created out of Plot No.68.
3. Who is the lawful owner of the suit properties between the Plaintiff and the 4<sup>th</sup> up to 9<sup>th</sup> Defendants.



4. Whether the Plaintiff is justified to block the way of access/path way used by the 4<sup>th</sup> and 5<sup>th</sup> defendants.
5. To what reliefs are the parties entitled.

During the trial, the Plaintiff was duly represented by **Mr. Mashaka Ngole** and **Ms. Beatrice Godfrey**, learned advocates. **Mr. Daniel Nyakiha**, learned State Attorney appeared for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. On the part of the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 9<sup>th</sup> defendants, **Mr. Alphonse Katemi** and **Ms. Leah Feruz**, advocates, were appearing holding brief of **Ms. Miriam Majamba**, learned advocate with instructions to proceed. The 7<sup>th</sup> Defendant was appearing in person, while the 8<sup>th</sup> Defendant enjoyed the service of **Mr. Masinde Chisumo**, learned advocate. At the end of the trial, the aforesaid learned counsel filed the final submissions which have been useful in the process of composing the instantaneous Judgment.

It should be noted that, in proving her case, the Plaintiff called three (3) witnesses who were, **Bahiyya Ahmad Kibola** (PW1), **Ally Maulid Mgomi** (PW2) and **Hassan Hussan Malende** (PW3). She tendered two exhibits which are, Certificate of Title No.127916 for Plot No.68 Hananasif Kinondoni (Exhibit P1) and the letter of Kinondoni Municipal Council addressed to Municipal Engineer (Exhibit P2).

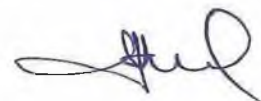


The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants paraded two witnesses who were **Kajesa Minga**, the Land officer (DW1) and **Joseph Hamis Mbwambo**, Assistant Technician Land Surveyor II (DW2). The two witnesses tendered no exhibit.

The 4<sup>th</sup> defendant had only one witness, **Gerald Peter Swai** who testified as DW3. He tendered the Lease Agreement dated 26/12/1986 and payment receipts (exhibit D1); Letter dated 01-08-1994 Ref. No.NHC/GEN/401/MNM (Exhibit D2); the Sale Agreement dated 4<sup>th</sup> October 1995 and Certificate of Occupancy Title No.47482 for Plot No.411 Block 40, Hananasif. (collective admitted as exhibit D3).

The 5<sup>th</sup> Defendant's case had only one witness, **Parmo Mathew Mendulo** (DW4). He submitted two exhibits which were; the letter from the National Housing Corporation dated 01.02.1995 Ref.No.NHC/MAG/462/6/RSN and that of 01.2.1995, Ref. No. NHCMAG/462/5/RSN together with the official receipts (admitted collectively as exhibit D4). Another exhibit was the Certificate of Occupancy, Title No.170694 for Plot No.412 Block 40 –Hananasif (Exhibit D5).

**Alfred Mulokozi** was the only witness who was called to testify for the 6<sup>th</sup> Defendant's case. He adduced evidence as DW5. Exhibits tendered for the 6<sup>th</sup> defendant's case were two. The exhibits included the Sale Agreement MAG/461





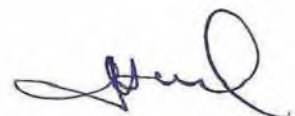
(D6) and the Certificate of Title No.171894 for Plot No.413 Block 40, Hananasif (D7).

The 7<sup>th</sup> Defendant, **Luka Simon Mongi**, is the only witness who testified for the 7<sup>th</sup> Defendant's case as DW6. He tendered his certificate of occupancy, with Title No. 49616 for Plot No.414 Block 40, Hananasif (exhibit D8).

On his part, the 8<sup>th</sup> Defendant called two witnesses, **Jimmy Paul Ntobi** who testified as DW7 and **Hans Aingaya Macha** (DW8). Exhibit tendered for the 8<sup>th</sup> defendant's case was the Certificate of Occupancy of Plot No.626 Block 40, Hananasif, CT. No.35627 (exhibit D9).

The 9<sup>th</sup> Defendant, **Thomas Raymond Mkinga** testified as DW9. He testified to be the owner of Plot No.410 Block 40, Hananasif Area. He had no exhibit to tender for his case.

The Court called two witnesses, **Anold Steven Ndos**i Land Officer (CW1) and **Romanus Sanga**, Principal Land Surveyor (CW2). CW1 tendered exhibit C1 which included the following documents:- Original file, LD/70406 for Plot No. 68 Hananasif Kinondoni Dar es Salaam; Original file, LD/185363 for Plot No.411 Block 40 Hanasif, Kinondoni, Dar es Salaam; Original file LD/194980 for Plot No.412, Block 40 Hananasif, Kinondoni Dar es Salaam; Original file No.



LD/191247 for plot No 414 Block 40, Hananasif, Kinondoni Dar es Salaam; and Original file No. LD/140006 for Plot No.626 Block 40 Kinondoni DSM.

CW2 tendered survey Plan No. D'571/43 Registered as Plan No. 31302 (exhibit C-2). He further submitted to court, Survey Plan No. D'1/571/43; Survey Plan D'1/571/D; Survey Plan D'1/571; Survey Plan No. D'1/571/41; and Survey Plan No. D'1/571/41 (collectively C-3).

In determining the matter at hand, I have opted to start with the 3<sup>rd</sup> issue as to ***Who is the lawful owner of the suit properties between the Plaintiff and the 4<sup>th</sup> up to 9<sup>th</sup> Defendants.*** It should be noted that the suit landed property in this case is Plot No.68, Hananasif which the Plaintiff claims ownership in the capacity of administratrix of the estate of the late **TAANISAH TAMBWE AREND.**


Evidence adduced by the Plaintiff (PW1), was to the effect that Plot No. 68 Hananasif, was allocated to the late Taanisah Tambwe Arend and Tambwe Arend by the 1<sup>st</sup> Defendant, the Commissioner for Lands. It was further adduced that, after the death of Tambwe Arend, Tanisah Tambwe Arend was issued with an offer in her name, but before she was given the title deed, Taanisah Tambwe passed away and consequently PW1 in the capacity of administratrix of the



estates was given the certificate of Title in February 2011 as legal representative. Oral evidence of PW1 was substantiated by exhibit P-1, the Certificate of Occupancy with Title No. 127916.

Evidence of PW1 was supported by the testimony of DW1 and CW1, the land officers who adduced to the effect that Plot No. 68 Hananasif is registered in the name of the Plaintiff as legal representative of the late Taanisah Tambwe Arend. It is also on record that plots No.411,412, 413, 414 and 626 Block 40 Hananasif were initially owned by the National Housing Corporation and the 4<sup>th</sup> up to 9<sup>th</sup> defendants were formerly tenants of in the houses in the respective houses. Evidence adduced by DW1,DW3,DW4, DW5, DW6, DW7, DW8, DW9 and CW1 revealed as follows:-

1. Plot No.411 Block 40 Hananasif is owned by one **Gerard Peter Swai**, the 4<sup>th</sup> Defendant *vide* the certificate of title No.47482 (exhibit D3).
2. Plot No.412 Block 40 Hananasif, C.T. No. 50596 is registered in the name of the late **SIRVEL DICK MENDULLO**, whose estate is under the administration of the 5<sup>th</sup> Defendant, **Parmo Mathew Mendullo** (Exhibit D5).



3. Plot No.413 Block 40, Hananasif, CT. No.17844 was allocated to the 6<sup>th</sup> Defendant one **Alfred Mulokozi** (exhibit D7).
4. Plot No.414 Block 40, Hananasif, CT. No.49616, is registered in the name of the 7<sup>th</sup> Defendant one **Lucas Simon Mongi** (exhibit D8).
5. Plot No.626 Block 40 Hananasif, CT. No.35627, is registered in the name of **Hans Aingaya Macha** (exhibit D9).

However, in the instant case, the suit property that this court is called to resolve the question of ownership is Plot No.68 Hananasif. 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" as provided under section 2 of the Land Registration Act (*supra*). 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 (*supra*) as evidence of ownership. It provides thus:

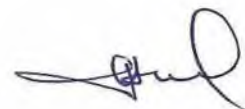
*"The owner of an estate in any parcel shall be entitled to receive a certificate of title under the seal of the certificate land registry in respect thereof, showing the subsisting memorials in the land register relating thereto ..."*(Emphasis added)

From the above quoted provisions, registration is 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."*



As previously stated, in the instant case, the suit landed property is **Plot No.68 Hananasif**. This is the property which this Court has been called to ascertain ownership of the same. Evidence on record, unequivocally prove that the Plaintiff is the registered owner of the same under the capacity of administratrix of the estate of the late Taanisah Tambwe Arend.

Let me turn to the 1<sup>st</sup> and 2<sup>nd</sup> issues on ***Whether plots Nos. 411,412, 413, 414 and 626 Block 40 were created out of Plot No.68 Hananasif;*** and ***Whether the creation of plots No.411,412, 413, 414 and 626 of Block 40, Hananasif Area was lawful.*** I have opted to deal with the two issues together because they are interrelated.

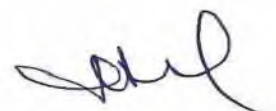
To prove the above two issues, the Plaintiff's duty was to establish that Plots No.411, 412,413,414 and 626 Block 40 Hananasif have been created within Plot No.68 Hananasif; and that such creation of the said plots was unlawfully. In trying to substantiate on the said issues, the Plaintiff who adduced evidence as PW1, told the Court that in April 2021, through exhibit P2, she applied for building permit to Kinondoni Municipal Council. PW1 also applied to the Council for re-establishment of beacons that define Plot No.68 at Hananasif for purpose of building the wall fence around the disputed plot.



According to PW1, the Municipal Council sent the Land Surveyor who managed to establish the said beacons. The testimony of PW1 was that the re-establishment of beacons for Plot No.68 Hananasif revealed an overlap of houses occupied by the 4<sup>th</sup>,5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> defendants in the land defined as Plot No.68 at Hananasif, the property of the Plaintiff.

The testimony of PW1 was supported by PW2 (Ally Mgomi), the Land Surveyor from the office of the Director, Kinondoni Municipal Council. His testimony was such that, he was the one who recovered the boundaries of Plot No.68 Hananasif. Having identified exhibit P2, he told the court that he restored the beacons as they were installed in the year 1978 by using Survey Plan No.D1/571 which he got from the office of the Director of Survey and Mapping. As per his testimony, in the course of restoring the boundaries of the suit Plot (Plot No.68 Hananasif), he discovered that there was another survey Plan No.D1/571/43 registered in 1998 creating other plots which overlap into the suit landed property.

In principle, it was the Plaintiff's duty, after having managed to prove that Plot No.68 Hananasif is hers as administratrix of the estate of late Taanisah Tambwe Arendi, to establish that plots owned by the 4<sup>th</sup> up to the 9<sup>th</sup> defendants overlap in her piece of land and that the creation of such plots, was unlawful.



The question is whether the plaintiff managed to discharge that duty. Evidence on record reveals that the Plaintiff discharged that duty by calling the appropriate witness PW2, the Land Surveyor from Kinondoni Municipal Council who testified to confirm that the Survey Plan D1/571/43 registered in 1998 created plots that overlap Plot No.68 Hananasif.

Having discharged her duty to prove her case, the onus to prove contrary to what was adduced by the Plaintiff shifted to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the Commissioner for Lands, the Director of Survey and Mapping and the Attorney General. I am holding so because **Sakar on Evidence in India, Pakistan, Bangladesh, Burma & Ceylon**, 14<sup>th</sup> Edition 1993, Sudipto Sarkar & V R Manohar, at page 1238, observes that:

*"An essential distinction between the burden of proof and onus of proof is that the burden of proof never shifts, but the onus of proof shifts. **Such a shifting of onus is a continuous process in the evaluation of evidence.**" (Emphasis is added)*

The Court of Appeal of Tanzania in the case of **Paulina Samson Ndawavya vs. Theresia Thomas Madaha**, Civil Appeal No.45 of 2017 echoed the above observation by the prominent author on law of evidence. It further





insisted in **Crescent Impex (T) Limited vs. Mtibwa Sugar Estate Limited**, Civil Appeal No.455 of 2020, thus:-

*"Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove..." (Emphasis added).*


On their part, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, through their witness, DW2 one **Joseph Hamis Mbwambo** from the Office of the Director of Survey and Mapping, admitted to know Plot No.68 at Hananasif. According to him the coordinates defining survey of Plots No.68 interfere with the survey Plans for Plots No.411,412,413,414 and 626 Block 40 at Hananasif. He told the court that his office recognizes the Survey Plan for plots No.411,412,413, 414 and 626 Block 40 Hananasif only. However, DW2 did not tender the survey Plan establishing Plot No.68 Hananasif and the one that created plots Nos. 411,412,413,414 and 626 Block 40 Hananasif.

The Court thought necessary to call the Director of Survey and Mapping to assist the Court in defining the survey plans for the alleged overlapping plots. The Director of survey and Mapping sent his principal officer who testified as Court Witness (CW2). The court wanted him to bring the survey Plan that



created Plot. No.68 Hananasif and the one created Plots No.411,412,413,414 and 626 Block 40 Hananasif. Unexpectedly, he was unable to bring the survey Plan for Plot No.68 Hananasif. According to CW2 the plan for the suit plot was not among the survey plans uploaded to the electronic system in the year 2017 and 2018 by the company engaged for that work. I must state right here that, CW2 could not assist the Court the way he ought to have done. I think, probably because he was from the office of the 2<sup>nd</sup> Defendant who opted to conceal some of the information which would have assisted the Court in deciding the matter at hand.

I managed to access file LD/70406 for Plot No.68 Hananasif Kinondoni Dar es Salaam which was tendered by CW1 and admitted as exhibit C1. According to the said file, Plot No. 68 Hananasif was created way back in 1975. The grant and registration of the right of occupancy in respect to Plot No.68 Hananasif, in the name of the Plaintiff has the meaning that the said Plot exists. I am taking that view based on the provision of section 22(1) of the Land Act, [Cap.113 RE 2019] which provides for incidents of granted right of occupancy. Among the incidents is that issued right of occupancy is granted in the land which has been surveyed.



It provides thus:

*"22.-(1) A granted right of occupancy shall be-*

*(a) ...*

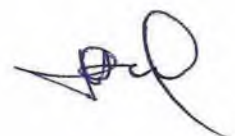
*(b)...*

*(c) of land which has been surveyed.. (Emphasis added)*

From the above provision of law, granted right of occupancy can only be issued in general or reserved land, which **has been surveyed**. In other words, a certificate of occupancy cannot, in anyhow be issued in respect of a none existing plot.

The fact that DW1 and CW1 the Land Officer from the office of the Commissioner for Lands testified to have knowledge of Plot No.68 Hananasif, registered in the name of the Plaintiff, then there must be a survey Plan to that effect which ought to have been brought by the 2<sup>nd</sup> Defendant (The Director of Survey and Mapping). This is because according to the Land Survey Act, Cap 324, the Director of Survey and Mapping (the 2<sup>nd</sup> Defendant) is the custodian of all survey plans. This is pursuant to section 13 of the Act which provides thus: -

*"13(1) Every land surveyor who makes a cadastral survey shall as soon as is practicable send to the*



**Director all original plans, original field notes and original computations and all such documents shall be deposited in the survey Division of the Department of Lands Survey and shall become the property of the Government.**" (Emphasis added)

From the above provisions, it was the duty of the 2<sup>nd</sup> Defendant (Director of Survey and Mapping) who is the custodian of all survey plans to explain to the Court on how Plot No.68 Hananasif was created and tender the said survey plan. Evidence from PW2, the Surveyor from Kinondoni Municipal Council was that Survey Plan No. D1/571 which was registered in 1978 used to create Plot No.68 Hananasif. CW2 tendered Survey Plan No. D1/571/43 which created plots No.411, 412,413,414 and 626 Block 40 Hananasif. The said survey plan, which was submitted by CW2, was approved and registered in 1998.

As aforesaid, the 2<sup>nd</sup> Defendant has the duty imposed by the law to be the custodian of all survey plans in Tanzania. The person who has the exclusive duty or right of custody of document or anything, when such document or thing is required to be produced before the court for purpose of proving any fact at issue, such person will have the duty to produce it. If such duty is not executed then the court will have the right to draw adverse inference against the person




who ought to have brought it. This is the same as failure of a party to call a material witnesses as was held in **Hemedi Saidi v. Mohamed Mbilu** [1984] T.L.R No.113 that:

*"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests."*

Being the custodian of all survey plans, the 2<sup>nd</sup> Defendant has the duty to produce into evidence any survey plan or map that is needed by the court. Failure to produce the survey plan as required like in this case, the court will have the right to draw adverse inference that had it been made available to the court then it would have been in favour of the adverse party, the plaintiff in the case.

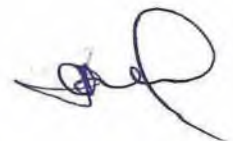
In the circumstance of the instant case, the Court draws inference that Survey Plan No. D1/571 that created Plot No.68 Hananasif does exist and has never been amended. From evidence of PW2 and DW2, the land surveyors, plots Nos. 411,412,413,414 and 626 Block 40 Hananasif overlap with Plot No.68 Hananasif. It is also into evidence that the survey Plan that established Plot No.68 Hananasif was registered back in 1978 while the one that created Plots



Nos. 411,412,413,414 and 626 Block 40 Hananasif was of 1998. Therefore, from the foregoing, since Survey Plan No. D1/571/43 was done without prior amending Survey Plan No. D1/571, in view of section 16 of the Land Survey Act (*supra*), then to the extent of the overlap, the Survey Plan No. D1/571/43 is invalid. The 1<sup>st</sup> and 2<sup>nd</sup> issues are thus answered in affirmative that plots Nos. 411,412, 413, 414 and 626 Block 40 were created out of Plot No.68 Hananasif and the creation of such plots was lawful.

The fourth issue for determination is on ***whether the Plaintiff is justified to block the way of access used by the 4<sup>th</sup> and 5<sup>th</sup> defendants.***

This issue is founded on the counter claim of the 4<sup>th</sup> and 5<sup>th</sup> defendants. I have gone through the testimonies adduced by the 4<sup>th</sup> and 5<sup>th</sup> defendants and found nothing has been adduced to prove the said issue of the plaintiff in the original suit to have blocked the way of access claimed by the 4<sup>th</sup> and 5<sup>th</sup> defendants. Evidence adduced in respect to the 4<sup>th</sup> and 5<sup>th</sup> defendants was on how they acquired plots No.411 and 412 Block 40, Hananasif, Kinondoni-Dar es Salaam. They could not adduce evidence to substantiate the allegation on the way of access being blocked by the Plaintiff in the original suit. It is the matter of principle that he who alleges has the duty to prove. In our jurisdiction this



principle is found under section 110(1) of the Evidence Act, [Cap.6 RE 2019] which provides thus: -

*"110.-(1) 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 exist.**"*

The above provision envisages that allegations impleaded must be proved good, true and or useful. Always, the court cannot rule in favour of unproven allegation. In the present case, the 4<sup>th</sup> and 5<sup>th</sup> defendants could not prove their counter claim that the plaintiff in the original suit has blocked the way of access to their respective properties. In that regard I find the 4<sup>th</sup> issue worth of being answered in the negative.

The last issue is on reliefs parties are entitled to. The Plaintiff has managed to prove her claims while the 4<sup>th</sup> and 5<sup>th</sup> defendants could not be able to prove their counter claim. Evidence on record unequivocally shows that the 1<sup>st</sup> and the 2<sup>nd</sup> defendants are the source of the dispute at hand. In the circumstance, they are the ones to bear costs incurred by the



Plaintiff in prosecuting this suit. From the foregoing, I make the following orders: -

1. The plaintiff is the owner of Plot No.68 Hananasif in Dar es Salaam covering the area of forty-two thousand two hundred and thirty square feet (42,230 sqf).
2. The 2<sup>nd</sup> Defendant is ordered to amend survey Plan, No. D1/571/43 and any other survey plans that overlap Plot No. 68 Hananasif, Kinondoni, Dar es Salaam.
3. The counter claim is dismissed.
4. The Plaintiff is entitled to costs of this suit to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 8<sup>th</sup> February 2024.



  
L. HEMED

**JUDGE**