

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE SUB REGISTRY OF MOROGORO)**

AT MOROGORO

LAND CASE NO. 8 OF 2023

OBADIA MJARIFU PLAINTIFF

VERSUS

NOVATUS KIMENYUKA DEFENDANT

Date of Last Order: 02/04/2024

Date of Judgement: 12/04/2024

JUDGEMENT

MAGOIGA, J.

The plaintiff, **OBADIA MJARIFU** by way of a plaint instituted the instant landed suit against the abovenamed respondent claiming several reliefs to wit:

- (i) A declaration order that the defendant is a **trespasser** and plaintiff is the **lawful owner** of plot No.2 Block "A" Kalengakelu Mlimba urban area;
- (ii) An order of permanent injunction restraining the defendant, assignees, privies, agents or any other person having interest or working on their authority from interfering the plaintiff's property situated at Plot No. 2 Block "A" Kalengakelu Mlimba urban area;



- (iii) Eviction order to the defendant, assignee, privies, agents or any other person having interest from the plaintiff's houses at Plot No. 2 Block "A" Kalengakelu Mlimba urban area;
- (iv) An order directing the defendant to pay the plaintiff **mesne** profit of Tanzania Shillings Three million (3,000,000/) per month from January 2023 to the date of the judgement which he has obtained from using the plaintiff's houses for **his business** and land for cultivation of pad at Plot No. 2 Block "A" Kalengakelu Mlimba urban area;
- (v) Order the defendant to pay all costs of this suit;
- (vi) General damages to be assessed by this court;
- (vii) Interest to be assessed by this court;
- (viii) Order (s) and any other relief(s) that this honourable court may deem fit and just to grant.

Upon being served with the plaint, the defendant filed a written statement of defence disputing all plaintiff's claims as baseless and averred that Plots No. 2 and No.3 Block "A" Kalengakelu Mlimba urban area was among the properties (including the buildings therein) sold to the defendant in sale agreement executed between parties herein. Consequently, the defendant prayed, among others, for dismissal of the instant suit with



costs and declare Plot No. 2 Block "A" Kalengakelu Mlimba urban area as part and parcel of the properties sold.

The facts of this suit as gathered from the pleadings are not complicated. It is alleged and not disputed that on 30th November, 2020 parties herein entered into written agreement for sale of a school by the name "**Kellu Hill Secondary School**" at the price of Tshs.250,000,000/- to be paid in six instalments (not the subject of this suit). According to the contract, the list of properties to be sold was to be prepared and verified by parties and was to be part and parcel of the contract. Further facts went on that on 08/12/2020 immediately upon signing and payment of the first instalment, the plaintiff handed over the school to the defendant who took over the management of the school and occupied the premises extending to Plot No.2 Block "A" Mlimba urban (the subject of this dispute).

The act of the defendant occupying and entering into Plot No. 2 Block "A" Mlimba urban area triggered this dispute and eventually the plaintiff knocked the door this fountain of justice for reliefs as contained in the plaint and the defendant remained adamant and daunted that, what he bought were Plots Nos. 2 and 3 and its unexhaustive improvements thereto, hence, this judgement after hearing parties on merits.

At all material time the plaintiff was enjoying the legal services of Mr. Constantino Gwivaha, learned advocate and the respondent had the legal



services of Messrs. Erick Felix Chale and Emmanuel Tarimo, learned advocates.

This suit went on well with all legal procedures up to the Final Pre-trial conference. During Final Pre-trial Conference, the following issues were proposed by the court, agreed between parties and recorded for the determination of this suit, to wit:

1. Whether Plot No.2 Block "A" Kalengakule Mlimba urban is part of the land which the plaintiff sold to the defendant;
2. If not, whether the entry into the said plot of land by the defendant was legal;
3. To what reliefs are parties entitled to.

In proof of his case the plaintiff testified as PW1 and called PW2, PW3 and PW4 and tendered in evidence **exhibits 1-7**. The defendant in disprove of the plaintiff's claims testified as DW1 and called DW2, DW3 and DW4 and tendered **exhibit D1** and prayed that **exhibits P1, P3 and P5** to form part of his defence.

In essence the plaintiff under oath told the court that, he only sold Plot No. 3 Block "A" to the defendant as per their agreement and its unexhaustive improvements, which plot was designed for school use only.

And in proof of this fact he tendered in evidence **exhibit PE5**.



As to Plot No. 2 Block "A" which was designed for special residential buildings and not a school use, PW1 told the court that it was not among the properties sold to the defendant and that the defendant entering into Plot No.2 amounts to trespass. PW1 tendered in evidence certificate of title on Plot No.2 Block "A" in his name as **exhibit PE1**.

According to PW1, the sale was specific as to what he sold to the defendant and he is disturbed by the defendant entering into Plot No.2, which was not among the properties sold. PW1 as well tendered in evidence the said contract as **exhibit PE2**.

Further testimony of PW1 was that in the contract they agreed to annex all properties sold and in proof of this tendered **exhibit PE3**.

On the totality of the above evidence, PW1 prayed that his testimony be believed and this court be pleased to grant all his prayers as contained in the plaint.

Under cross examination by Mr. Chale, PW1 told the court that the defendant trespassed into the disputed plot at first in 2021 and last time was in January 2023. PW1 admitted there is a hostel in plot No.2 but denied it to form part of the properties sold. Pressed with question, PW1 admitted that item 10 of exhibit PE2 was meant to cover immovable properties and that there was inspection done and many people were there and one of them was the hamlet chairman one Mgungusi. PW1 when

shown exhibit D1 admitted to have signed it but denied the rest of the contents and admitted not handing over the titles until the final payment. Under re-examination PW1 told the court that when he signed exhibit D1 no mention of the properties was there.

Asked by the court to clarify if in exhibit PE2, there was specific mention of Plot No.3, PW1 clarified that no mention of the plot was stated but it was generally mentioned as the school.

Next witness for the plaintiff was **ISAYA KOMBO** (to be referred as "**PW2**"). Under oath PW2 told the court that he was a school accountant from 2007 to 2020 and know all parties herein. According to PW2, the school is in Plot No.3 Block "A" with one dormitory resided by boys and girls resides at hostel which is in Plot No.2 Block "A" -a property owned by the plaintiff. PW2 admitted that they went around the school and signed against their names, put their respective phone numbers and the hamlet chairman Mgungusi was among the people who were in attendance. PW2 insisted that what was surveyed was Plot No. 3 alone and no more.

Under cross examination by Mr. Chale, PW2 told the court that the place of the dormitory and hostel are adjacent and are not very far from each other. As to the signing of the attendance, PW2 admitted signing an attendance and not the rest of the contents. Further pressed with



question, PW2 admitted that the aim of visiting the school was to show the buyer what he intends to buy.

Next witness for the plaintiff was Mr. **MAGUSU MUGOKA** (to be referred herein as "**PW3**"). Under oath PW3 told the court that he is an advocate and knows parties in this case as he prepared a contract for sale of the school exhibit PE2 and that the school is in Plot No. 3 Block "A". PW3 identified the exhibit P2 and exhibit P5. According to PW3, item 10 and 19 was meant that the contract was to be accompanied by all properties of the school after being verified by both parties.

Under cross examination by Mr. Chale, PW3 admitted that Plot No.3 was not specifically mentioned in exhibit PE2. Pressed with question on the import of clause 10, PW3 told the court that a list of the properties to be sold was to be done and was to form part and parcel of the contract. PW3 admitted not knowing what is in Plot No. 2 in terms of its development.

Under re-examination by Mr. Gwivaha, PW3 admitted that he was not shown the list of the properties to be sold.

The last witness for the plaintiff was Ms. **ESTER OBADIA MJARIFU** (to be referred as "**PW4**"). Under oath told the court that he knows the school which is in Plot No.3 Block "A". PW4 admitted that apart from signing exhibit PE2 as daughter of the plaintiff but was not there when parties verified the properties to be sold.



Under re-examination, PW4 insisted that plot No. 2 was not among the properties sold.

This marked the end of the plaintiff's case and same was dully closed.

The defendant, **MR. NOVATUS KIMENYUKA** (to be referred as "**DW1**") DW1 under oath told the court the plot in in dispute was one of the properties he bought when buying the school which is called Kellu Hill Secondary School. According to DW1, this was after seeing the school and verifying all the properties to be sold done by himself and the plaintiff in front of other people including the hamlet chairman one Mgungusi. DW1 further testimony was that in Plot No. 2 there was girls' dormitory, eating hall and toilets and playing grounds, while in Plot No.3 there were classrooms, staff houses, gate, boys' dormitory, administration block and manager's office, kitchen and latrines. DW1 went on telling the court that, after verifying the properties, PW1 showed him the certificates of titles of plots No.2 and 3 showing the size and boundaries and they wrote a list of properties to be sold and tendered in evidence **exhibit DE1** containing a list of the properties to be sold. DW1 insisted that plot No.2 was among the listed and verified properties to be sold and mentioned all people who were present on that day.



Further testimony of DW1 was that the list of properties as stated in clause 10 to be annexed in the contract is as in exhibit DE1. According to DW1, the list specifically mentioned Plots Nos. 2 and 3 Block "A".

Under cross examination by Mr. Gwivaha, DW1 told the court that exhibit DE1 do not show the one who wrote but it was George Mwambene who wrote it.

Next witness for defence was **Mr. ALPHONCE MWAIPUNGU** (to be referred as "**DW2**"). Under oath DW2 told the court that he was given the task of selling the school by the plaintiff and managed to get the defendant as a buyer. According to DW2, the properties to be sold were Plots Nos. 2 and 3 and mentioned exactly the same properties in Plot No. 2 as done by DW1.

Under cross examination by Gwivaha, DW2 insisted that the plots to be sold were Plots Nos. 2 and 3 and he verified them with the plaintiff before put for sale.

Next witness for defence was **MR. GEORGE ANTHONY MWAMBENE** (to be referred as "**DW3**"). Under oath told the court that he was instructed by the defendant to verify what is to be sold and went there and PW1 showed him Plots No.2 and 3 with its developments as what is being sold. DW3 mentioned the properties in plot No. 2 and the last time he was there verifying the properties was on 30th November, 2020 and



were about 8 people. Further testimony of DW3 was that he was the one who wrote the contents of exhibit DE1 and that signing was done after the contents were read out to all in attendance. According to DW3, they did not write everything but major ones and mentioned the plots to be sold as Plots No.2 and 3.

Under cross examination by Mr. Gwivaha, DW3 told the court that buildings in Plot No. 2 are adjacent to each other. Pressed with question, DW3 told the court that after verification, they prepared exhibit DE1 and it was signed by all in attendance. As to the map they were referring in exhibit DE1, DW3 explained that are the approved survey plan in the title deeds. As to the items listed, DW3 explained that they listed major ones but there were other small ones like toilets and kitchens which were not listed.

The last witness for the defence was **Mr. DEODATUS MGUNGUSI** (to be referred as "**DW4**"). Under oath DW4 told the court that he remembers that he was called by the plaintiff as hamlet chairman to witness the boundaries between his neighbour and went all to the hostel and kitchen and last was told by the plaintiff that all the places they have surveyed are to be sold to the defendant. According to DW4, he was the one who instructed DW3 to write what they have seen in the two plots to be sold. Further testimony of DW4 was that they identified the plots to be

sold as Plot Nos. 2 and 3 Block "A" and exhibit DE1 was read to all of them before signing it.

Under cross examination by Mr. Gwivaha, DW4 told the court that the name Kellu Hill Secondary School is found in exhibit P5.

Asked to clarify if exhibit DE1 was read before it was signed, DW4 clarified that it was read loud before signing before parties.

This marked the end of the defence case and same was dully closed.

Parties' learned advocates prayed to file final closing submissions and I granted the prayer. I have had time to read their rivaling arguments and commend them for their insightful input on this matter. However, I will not be able to capture all their submission in this judgement but in the course of answering the agreed issue, I will refer to them and where I will not, it suffices to say are respectively considered.

Having heard the evidence by both sides of this legal dispute, I have noted that, there are some facts not in dispute, and which, in way will assist and narrow the scope to answer the issues arose in this suit. These are: **One**, there is no dispute that on 30th November, 2020 parties herein entered into contract for sale of Kellu Hill Secondary School which is situated at Mlimba urban at the consideration of Tshs.250,000,000/- to be paid in six installments. **Two**, there is no dispute that the defendant paid the first installment before signing the contract and was handed over the

management of the school by the plaintiff as agreed in the contract.

Three, there is no dispute as well that change and handing over of all relevant certificate of titles, if any, was to be done after the last installment is paid up. **Four**, there is no dispute that in the said agreement neither plots No. 3 nor 2 was specifically mentioned.

However, what is in serious dispute between parties is whether plot No. 2 was among the properties sold to the defendant and the list of the properties envisaged by parties in this contract.

With that note, now the noble task of this court is to answer each issue against the evidence on record. I will start with the first issue which was couched that **"Whether Plot No.2 Block "A" Kalengakule Mlimba urban is part of the land which the plaintiff sold to the defendant."**

Mr. Gwivaha, learned advocate for the plaintiff in his reasoned submissions urged this court to answer the first issue in the negative that what was sold is Plot No. 3 only. According to the learned advocate for the plaintiff, the above conclusion is supported by certificate of occupancy exhibit PE5, valuation report of the school, insurance cover and sale agreement which all exclude Plot No.2.

As to the contents of exhibit DE1, Mr. Gwivaha strongly urged this court to disregard this exhibit for reasons that: **one**, is not clear when was

written, who wrote it, signatures appear first before contents, it was not read before parties, that it was not possible to do all activities done on that day and that the advocate who prepared exhibit PE2 denied to recognize the same. **Two**, exhibit DE1 was written before parties finally agreed putting their terms and intention into writing in the sale agreement. In this, the learned advocate argued that, all parties testified that it was prepared before the signing of exhibit PE2. In the foregoing, thus, Mr. Gwivaha argued that exhibit DE1 was pure pre-contractual negotiations as such not binding as per section 10 of the Law of Contract Act, [Cap 345 R.E. 2019]. In support of his position the learned advocate cited cases **Chartbrook Ltd Vs. Persimmon Homes Ltd [2009] UKHL 38, Prenn Vs. Sommonds [1971] 1 WLR 1384** and **Faith Day Care and Primary School Vs. International Commercial Bank (T) Ltd, Civil Case No.110 of 2019 (HC) DSM (unreported)** all of which held that pre contractual negotiations are not binding.


Regarding the hostel situated at Plot No. 2 Block "A" it was the argument of Mr. Gwivaha that, all plaintiff's witnesses testified that plot No.2 was not part of what was sold because in it there is hostel, hence not part of the school.

On the above reasons, the learned advocate for the plaintiff strongly urged this court to find and hold the first issue in the negative and



consequently find the second issue answered in the positive that the defendant is a trespasser and continue granting all reliefs as claimed in the plaint.

On the other hand of the defendant, Mr. Chale urged this court to find and hold the first issue in the positive that Plot No. 2 Block "A" was part of the properties sold on the following reasons: **One**, Exhibit P2 which is the contract did not specifically mention the properties as such has to be read together with Clause 10 which is all about list of the properties to be attached. According to Mr. Chale, Exhibit DE1 which was dully executed by all parties and their respective witnesses obviously and no doubt mentioned Plot No. 2 Block "A" as part of the properties sold. Further, Mr. Chale argued that exhibit DE1 is where the girls' dormitory is found. According to Mr. Chale nothing was proved that it was a hostel and not a dormitory and invited the court to find that the plaintiff utterly failed to prove his allegations that it was not connected with the school.

It was further submission of Mr. Chale that all defence witnesses proved that what the defendant was shown as to be sold from DW2 to DW4 was Plots No.2 and 3 Block "A". Not only that but it was the submission of Mr. Chale that the contents of exhibit DE1 was read to the parties as testified by DW1, DW3 and DW4. 

As to the contents of exhibit PE3 which the plaintiff tendered to prove handing over, Mr. Chale argued that it is unfounded since exhibit PE3 was only handing over of movable office items which the defendant could not agree to pay for Tshs.250,000,000/-.

According to Mr. Chale, much as the first issue is to be answered in the affirmative, then the second issue dies a natural death and urged this court to grant the reliefs prayed by the defendant in his written statement of defence including the dismissal of the suit with costs.

Having dispassionately considered the pleadings, the oral testimonies of the parties' witnesses, the documentary evidence tendered and the final closing rivaling submission by the learned trained minds for parties, in my respective opinion and with due respect to the learned advocate for the plaintiff, I am akin to answer the first issue in the affirmative that Plot No.2 Block "A" in Mlimba urban was part of the properties sold to the defendant. The reasons I so found in this suit are abound. **One**, on the pleadings, the defendant in his written statement of defence clearly stated that apart from the contract that was signed between parties, in particular, clause 10 stated that list properties to be sold was to be prepared which was to form part and parcel of the agreement. In reply to the written statement of defence, in particular in paragraph 3, the plaintiff never replied anything concerning the contents of exhibit DE1 which is an

admission that same was prepared and dully signed by parties. Even the reply to paragraph 7 of the written statement of defence, the plaintiff just said it was not an addendum in the eyes of law without saying which law he was referring to. It was, in essence, general denial but admitted that they signed and was only referring to plot No.3 which testimony is against the spirit of section 101 of the Evidence Act, [Cap 6 R.E. 2019] that oral testimony cannot defeat the contents of the written document. See the case of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 others, Civil Appeal No. 38 of 2012 [CAT] DSM (unreported)** in which it was held that:

"Once it is shown that the contract was reduced into writing in term of section 101 of the Evidence Act, [Cap 6 R.E. 2002] (now 2019), a part to such contract is not permitted to adduce oral evidence of purposes of contradicting, varying, adding or substituting form its terms".

It is at trite law in our jurisdiction that, parties are bound by their pleadings. The plaintiff, is thus bound by his pleading because exhibit DE1 was not specifically denied nor challenged and admitted without objection and no serious cross examination was put to the defendant to discredit it contents. The above stance is supported by the cases of **Barclays Bank**



(T) Ltd Vs. Jacob Muro, Civil Appeal No. 357 of 2019 [CAT] Mbeya (Unreported) in which it was held that:

" We feel compelled, at this point, to restate the time honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored"

Two, On the same token, having heard all testimony of the plaintiff nowhere he asserted any allegation of the misrepresentation, forgery, fraud, coercion or undue influence when he signed the contents of exhibit DE1. A mere oral and general denial by the plaintiff that plot No.2 Block "A" was not part of the properties to be sold was not enough on his part.

Three, the oral testimonies of the defence witness, in particular, that of DW4, who was neutral party to these proceedings and who was not even challenged was clear that exhibit DE1 was read over to parties before it was eventually signed by all in attendance. **Four,** the heading of exhibit DE1 is clear that all parties involved knew what was at issue because it was obviously stated that, I beg to quote:

"ZIARA YA KUKAGUA ENEO LA OBADIA MJARIFU KWA LENGU LA KUUZIANA NA NDUGU NOVATUS KIMENYUKA".



From the above heading in the contents of exhibit DE1, it cannot be said that the survey was not meant to meet the terms of Clause 10 of exhibit PE2 in the absence of other evidence to the contrary. The plaintiff utterly failed to prove that Plot No.2 Block "A" was not among the properties listed but the defendant was able to prove that it was.

Five, the contents of exhibit P4- the valuation report and the insurance cover which the plaintiff wanted to show that were concerning what was sold were, in my considered opinion, tendered out of context because exhibit P4a was prepared in 2015 and the alleged transaction was concluded in 2020 five years later as such irrelevant to this case. Equally, exhibit P4b was for 2018 and has no relevance to the properties to be sold. On that note, I disregard them all.

Six, the allegations by plaintiff that he only sold plot No. 3 Block "A" because it was the one which is for school buildings is unfounded and is against the contents of Clause 10 in exhibit PE2 which did not mention plot 3 and that Clause is complimented by the list which was exhibit DE1 and by all standards special residential purposes Class (a) may also cover residential portion of schools as proved that the girls' dormitory is in Plot No 2. A mere argument that one is a hostel and dormitory in my considered opinion, are mere technicalities and semantic which do not go



to the room of the matter and was not proved by the plaintiff that there is a hostel.

Seven, the reasons in final written submissions by the learned advocate for the plaintiff that I should disregard the contents of exhibit DE1 are against the evidence on record because DW3 testified when the same was written, he wrote it under the instructions of DW4, it was read out as testified by all defence witnesses who were present, the mere failure to write the date do not invalidate its contents and the arguments that it was pre-contractual negotiation is a new argument arising from the bar and not supported by the evidence on record. In this respect, even the cases cited in support of his stance are distinguishable and were cited out of context and are hereby rejected. The status of final written submissions was underscored in the case of **Luhumbo Investment Ltd Vs. National Bank of Commerce Limited and 2 others, Civil Appeal No. 503 of 2020 [CAT] Shinyanga (Unreported)** in which it was held that:

"It is a trite law that parties are bound by their own pleadings. At any standard, written submissions and its annexures do not form part of the pleading and the same are not intended to submit new facts or oral evidence but



only to elaborate on the facts and/or evidence already indicated in the pleadings."

Eight, quite right as correctly argued by the learned advocate for the defendant, and rightly so in my opinion, with the evidence on record I found the case of plaintiff wanting in material proof of his allegations. With the contents of exhibit DE1, the defendant has proved that in the list of properties to be sold, plot No. 2 Block "A" was among the properties sold in the absence of any evidence to the contrary.

That said and done, I find the claims, evidence and final closing submissions by the plaintiff wanting and same are hereby rejected and dismissed.

In the foregoing and for the reasons given above, I find the first issue in the affirmative that plot No.2 Block "A" Kalengakelu Mlimba in Kilombero district is part of the land which the plaintiff sold to the defendant.

Consequently, the second issue as rightly argued by the learned advocates for the defendant, and in my own respective opinion, dies a natural death and same becomes redundant.

Next is **"to what relief parties are entitled to."** Given my finding above on issue number one, the instant suit must be and is hereby dismissed for want of merits with costs.



On the part of the defendant, I find other prayers as contained in the written statement of defence untenable for want of counter claim as such same are not to be entertained now.

It is so ordered.

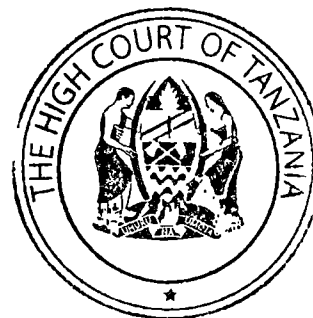
Dated at Morogoro this 12th day of April, 2024.


S. M. MAGOIGA
JUDGE
12/04/2014



COURT: Judgement delivered in the presence of the learned advocates and their respective parties in chambers today 12th day of April, 2024


S. M. MAGOIGA
JUDGE
12/04/2024



COURT: Right of appeal fully explained.


S.M. MAGOIGA
JUDGE
12/04/2024