

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT MOSHI

LAND CASE NO.31 OF 2017

BAKARI RAJABU KIKO.....PLAINTIFF

VERSUS

KIKO RAJABU KIKO.....1ST DEFENDANT

**KIKO RAJABU KIKO (As a legal personal representative
of Late Rajab Kiko Mgalla.....2nd DEFENDANT**

EX-PARTE JUDGMENT

B. R. MUTUNGI .J.

The plaintiff herein has sued the defendants jointly and severally praying for judgment and decree for the following orders:-

- a. A declaration that the suit properties are owned by the plaintiff.
- b. General damages against the Defendants for trespass.
- c. Cost of this suit.

d. Any other relief(s) as this Court may deem fit to grant.

Briefly, the dispute centers on the ownership of four (4) pieces of land, the 1st measuring 25 acres located at Rundugai village, the 2nd measuring 12 acres located at Chemka-Rundugai village, the 3rd measuring 4 acres located at Massama-Rundugai Village, and the 4th one measures 4 acres located at Ng'oswa village all found within Hai District, Kilimanjaro Region. According to the Plaintiff, the Plaintiff claimed to be the owner of the suit pieces of land which he acquired by clearing the forests in the years 2000, 1982, 1982, and 1964 respectively. That on 19th August, 2017 the defendant trespassed into the suit properties and forcefully dug land furrows announcing to own the said pieces of land. Following such trespass, the plaintiff thus decided to institute this suit against the defendants.

Upon the plaint being filed and served unto the defendants, they failed or neglected to file their written statement of defence on time and thus on 23rd October, 2018 the defendants' Counsel orally prayed for extension of time to file their written statement of defence. The prayer was

granted for the defendants to file a formal application within 7 days. Upon determination of the said application, it was struck out with costs on 19/12/2018. The defendants made another attempt but the application was once again struck out on 31/3/2020. Following the said outcome, the suit was ordered to proceed Ex-parte.

Before this court the plaintiff was represented by Mr. Kipoko Learned Advocate. Proving his claims against the defendants, the plaintiff marshaled 3 witnesses, Bakari Rajab Kiko (the Plaintiff as PW1), Hamza Rajab Kiko (PW2) his brother, and Sembua Hussein (PW3) a neighbour. PW1, PW2 and PW3 accounted that, the plaintiff is the lawful owner of the 4 pieces of land located at Ngoswa, Rundugai, Chemka, and Massama and that he has been using the said farms for a long period of time. It was PW1's evidence that he acquired the 1st farm which is located at Ngoswa (Kitivo Farm) in 1964 from the Washeli. He cleared the said farm measuring 4 acres and ever since he has been using it for farming purposes. The Rundugai farm (Chokaa Farm) was acquired in 1982. He was allocated the said farm by the area leaders. The boundaries being Omari Ramadhani Muliro, Abedi Yacob, Hemed Kingoro's family and a

Merelani road. Another farm located at Chemka (kwa Asrom) was acquired through uprooting and clearing the trees in 1982. The fourth farm where the plaintiff resides todate was acquired in 1998 after the original owner had left. The boundaries are Hemed Kingoro, Senkondo Shangali and Hemed Simbane. The plaintiff was perturbed by the defendant's allegations that, the same were the properties of the Late Rajabu Kiko Mgalla.

The above being the end of the plaintiff's evidence, the issues for determination before this court are; who is the lawful owner of the suit properties and what relief(s) are the parties entitled to.

Reacting to the first issue, it is clear from the outset that all of the suit properties are located at the village and thus governed by **The Village Land Act**. According to **Section 8(1) of The Village Land Act, Cap.114** the Village Council is responsible for the management of the village land. The law is also very clear on how to acquire the village land, and one among the ways which is used by the villagers and non-villagers is through clearing and uprooting the forests after allocation by the village council.

Coming back to the matter at hand, it was the plaintiff's claim that, he acquired all 4 pieces of land after clearing and uprooting the forests. The plaintiff also alleged that he was allocated the Ngoswa land by the Washeli, and the land at Rundugai by the Village leaders. That he has lived and used the said pieces of land for many years, until such time that the defendant trespassed therein recently. The appellant is trying to establish the principle of adverse possession, that he has been using the said land uninterrupted for all those years.

In any case, the adverse possession principle is invoked if there is acquiescence on the part of the owner of the suit land. The facts at hand reveal that two pieces of land were allocated to him by the village leaders, the other two pieces were acquired through clearing and uprooting the forests and among the two the land allocated at Massama was acquired after the owner had left. The plaintiff's testimony on acquisition of the said suit properties alone invalidates the applicability of the principle of adverse possession as there was no acquiescence by the former owners of the lands impliedly or expressly. Further, the evidence did not establish any uninterrupted possession of

the suit land and therefore makes the plaintiff's claim doubtful.

This court wishes to remind the plaintiff that the burden of proof lies in the person who alleges. An ex-parte hearing doesn't automatically prove that the claims by the plaintiff are genuine. Even with the absence of the defendant's evidence, the plaintiff has still a duty to prove his allegations as per the required standards in civil jurisprudence.

In this case therefore, the plaintiff had the burden to prove that, he is the owner of the disputed pieces of suit land. He cannot shift the burden on the defendants. **Section 110 (1) of the Evidence Act, Cap.6 R.E.2002**, provides as follows:-

"Whoever desires any Court to give judgment as to any legal right or liability depends on the existence of facts which he asserts, must prove that those facts exists."

Despite the allegations by the plaintiff that, the suit pieces of land were allocated to him, there is no proof that he was actually allocated the suit land by the Washeli or even the village leaders. As earlier stated, the village council being responsible for land allocation within the village, follows that

all the members of the village council ought to know the land owned by their respective village members. Surprisingly, in the instant case, no village council member or village leader testified to this fact nor any document presented either to that effect.

Even though the plaintiff's witnesses also claimed that the plaintiff had used the pieces of land for a long period of time, no witness testified on how the same were acquired or that the plaintiff had enjoyed the use of the said properties uninterrupted. PW2's testimony varies with that of PW1 as he testified that the disputed land is made up of 3 pieces and not 4 pieces as alleged by the plaintiff. This shows that PW2 was not even aware of the size of the trespassed land. Apart from that, PW3 testified that he is the plaintiff's neighbor at Kitivo farm. This is only one piece of land among the 4 pieces claimed to be trespassed upon by the defendants. Being the neighbor of just one piece of land cannot be presumed that he has knowledge of the rest of the plaintiff's land nor how he came to possess the same. More so there being no documentary proof.

From the stated reasons, it is the court's settled finding that,

the plaintiff has failed to establish ownership of the said pieces of land by simply giving a narration of the history without providing sufficient proof. This answers the first issue.

Since the first issue has been resolved, I will not labour much on the 2nd issue as the same depends on the outcome of the 1st issue. Having stated so, I hereby sanction the suit to a dismissal with no order to costs.




B. R. MUTUNGI

JUDGE

27/8/2020

RIGHT TO APPEAL EXPLAINED


B. R. MUTUNGI

JUDGE

27/8/2020