

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[LAND DIVISION]**

**AT ARUSHA**

**LAND CASE NO. 57 OF 2017**

**MARY LEMA ..... PLAINTIFF**

***Versus***

**STEPHANO STEY OLESUNGUYAI ..... 1<sup>ST</sup> DEFENDANT**

**MAKUYUNI VILLAGE COUNCIL ..... 2<sup>ND</sup> DEFENDANT**

**MONDULI DISTRICT COUNCIL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

*20<sup>th</sup> November & 14<sup>th</sup> December, 2020*

**Masara, J.**

The Plaintiff, **Mary Lema**, is suing the Defendants, claiming for a piece of land measuring 10 acres located at Makuyuni Village, Monduli District within Arusha Region (the suit land). The Plaintiff claimed that she was allocated 10 acres of land by the 2<sup>nd</sup> Defendant in 2009 and later approved the allocation on 27<sup>th</sup> May, 2014. The suit land borders Lowasa Secondary in the North, VETA college in the in the East, in the West it borders Manyara ranch and in the South, it borders a Valley and TANESCO poles. In the course of surveying the suit land and securing its ownership documents, the Plaintiff realized that the 1<sup>st</sup> Defendant had trespassed into the suit land claiming to be his. That occurred in December, 2016 when TANESCO's 400KV project was crossing her land and the 1<sup>st</sup> Defendant presented himself to TANESCO as the owner of the suit land. She attempted to seek the intervention of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, but when she failed to get what she desired, she instituted this suit seeking the following orders:

- a) To be declared the lawful owner of the suit land;*
- b) An order permanently restraining the Defendants and their agents from interfering with the Plaintiff's possession and lawful use of the suit land;*
- c) An order against the first Defendant for payment of General damages to be assessed by the court;*
- d) Costs of the suit; and*
- e) Any other relief the court deems just to grant.*

The 1<sup>st</sup> Defendant denied the claim stating that he was allocated the suit land by the 2<sup>nd</sup> Defendant in January 2005. In the joint statement of defence, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied the claim by the Plaintiff stating that the suit land was allocated to the 1<sup>st</sup> Defendant since 2005.

At the hearing of this case, the Plaintiff was represented by Mr. Aggrey C. Kamazima, learned advocate, the 1<sup>st</sup> Defendant was represented by Mr. Melkizedeck Hekima, learned advocate, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were represented by Mr. Mkama Musalama, learned State Attorney assisted by Mr. Siloma Sembele, solicitor for the 3<sup>rd</sup> Defendant.

To substantiate the case, eight witnesses testified on the Plaintiff's side. These are Mary Aggrey Lema (PW1); Godlisten Lovotari Merinyo (PW2); Clemence Bimbi (PW3); Paulo John Maasay (PW4); Peter Laisangai (PW5); George Suyan Mollel (PW6); Lemali Laon Mollel (PW7) and Kasi John Maasay (PW8). Sixteen exhibits were tendered by the Plaintiff; namely, Plaintiff's letter applying for the suit land (Exhibit P1); Minutes of the Village Assembly dated 20/1/2009 (Exhibit P2); an e-mail and costs annexed dated 3/12/2013 (Exhibit P3); Plaintiff's letter applying for approval (Exhibit P4); Minutes of

the village council and Village assembly dated 8/2/2013 and 21/5/2014 respectively (Exhibit P5); a letter to the Plaintiff confirming grant of the suit land (Exhibit P6); an e-mail from the first Defendant to the Plaintiff (Exhibit P7); Complaint letter and its reply to TANESCO (Exhibit P8); demand letters dated 11/7/2017 and 14/7/2017 (Exhibit P9); a letter from the Ministry of Water and Livestock Development dated 6/5/2005 (Exhibit P10); a letter from VEO Makuyuni to PW4 (Exhibit P11); PW4's Voter's ID (Exhibit P12); a complaint letter from Makuyuni villagers to District Executive Director Monduli (Exhibit P13); 3 letters addressed to PW5 confirming signature (Exhibit P14); PW7's Voter's ID (Exhibit P15) and PW8's voter's ID (Exhibit P16).

The Defendants summoned five witnesses. These are Stephen Stey Olesunguya (DW1); Lucy Sanka (DW2); Silanga Kalasinga (DW3); Grace Alex Mayunga (DW4) and Reginald Robert Tesha (DW5). They tendered two exhibits; namely, DW1's application letter for the suit land (Exhibit D1) and a letter from 2<sup>nd</sup> Defendant granting 1<sup>st</sup> Defendant the suit land (Exhibit D2).

Before commencement of the hearing, the following issues were framed for determination:

- a) Who is the lawful owner of the suit land? and*
- b) To what reliefs are the parties entitled to?*

### **Who is the lawful owner of the suit land?**

Mary Lema testified that on 30/7/2007 she wrote a letter to Makuyuni village requesting for a piece of land measuring 20 acres for the purposes of building

an elementary school. The village council convened a meeting in 2009 and recommended that she be allocated only 10 acres. The Village Assembly granted her s proposed by the Village Council. The minutes of the village council and Assembly were admitted as exhibit P2. In 2010, she surveyed the land and fixed beacons thereon assisted by a surveyor known as Haule. It was numbered Plot No. 3069. She paid various fees, as per exhibit P3. In 2013, she was summoned and interrogated by the village council, and on 21/5/2014 the Village Assembly approved her allocation of the 10 acres of land. As per exhibit P5.

It was further her testimony that on 27/5/2014, she received a letter from the Village Executive Officer (exhibit P6) confirming that her application was approved by the Village Assembly. She then started processing a title deed. However, in December, 2016 she was informed that the 1<sup>st</sup> Defendant had presented himself to TANESCO officers as the owner of the suit land for the purposes of compensation for putting of TANESCO power lines. She made efforts to contact the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to resolve the matter but in vain. She communicated with TANESCO officials asking them not to compensate the 1<sup>st</sup> Defendant as he is not the owner of the land. TANESCO officials responded that during the survey, both the Plaintiff and the 1<sup>st</sup> Defendant should appear with proof of ownership over the suit land. The communications are exhibited by exhibit P8. She also issued all the Defendants with demand letters (as per exhibit P9) intimating her intention to sue. The 2<sup>nd</sup> Defendant responded that the suit land is lawfully owned by the 1<sup>st</sup> Defendant. She made follow up with the District Executive Director's

office regarding her application for a certificate of occupancy but she was told that her survey documents got lost.

Mary Lema's evidence was augmented by that of PW2, Golisten Lovotari Merinyo, who testified that he was the village chairman in 2013 and that he chaired the General Assembly meeting which allocated to the Plaintiff the 10 acres of land currently under dispute. Mr. Merinyo told the Court that PW1 was allocated the land which was originally used as grazing land known as holding ground. He also stated that there was no need of signing any contract to accomplish ownership after the Village Assembly granted the land. He tendered exhibit P10, a letter from the Ministry of Water and Livestock Development, which handed 510 acres of land (holding ground) to Monduli District Council. PW2 added that it was not possible for anyone to be allocated land in the holding ground before 6/5/2005. He also tendered exhibit P11 containing the disputed signature of the late Mesarieki Saitabau, who worked at Makuyuni as the Village Executive Officer in 2005.

Clemence Bimbi (PW3), Paulo John Massay (PW4), Peter Laisangai (PW5) and George Suyaan Mollel (PW6) testified that they all attended the Village General Assembly meeting of 21/5/2014 which approved the Plaintiff's ownership over the suit land. According to their evidence, the suit land belongs to the Plaintiff. PW3 added that he was the one who assisted the Plaintiff in fencing the suit land and also to make follow-ups assisted by one Pastor Shedrack. PW5, Lemali Laon Mollel (PW7) and Kassi John Maasay (PW8) denied participating in the Village General Assembly meeting and

signing the minutes of that meeting on 15/1/2005 as stated by the 1<sup>st</sup> Defendant.

The Plaintiff's evidence was also supported by final submissions filed by her advocate, Mr. Kamazima. Mr. Kamazima contended that the Plaintiff explained thoroughly how she was allocated the suit land adding that the exhibits tendered (P1-P9) highly persuade that the suit land belongs to the Plaintiff and not the 1<sup>st</sup> Defendant. He added that the date the 1<sup>st</sup> Defendant stated that he wrote the letter to the village applying for the suit land was a Saturday, in which public offices are not open. He also faults the signature in exhibit D2 stating that it was forged as opposed to the one appearing in exhibits P11 and P14 and the evidence adduced by PW3 and PW5.

Mr. Kamazima restated the principle that parties are bound by their own pleadings and that the fact that DW4 and DW5 departed from what they pleaded in the Written Statement of Defence that the suit land belongs to the 1<sup>st</sup> Defendant was proof that they did not have a good case. To support his argument, the learned advocate referred to the case of ***Astepro Investment Co. Ltd Vs. Jawing Company Limited***, Civil Appeal No. 8 of 2015 (unreported). He therefore concluded that the 1<sup>st</sup> Defendant failed to prove his ownership over the suit land on the required standard. He cited the case of ***Barelia Karangirangi Vs. Asteria Nyaiwambwa***, Civil Appeal No. 237 of 2017 (unreported) to further cement his views.

On the defence side, Mr. Stephano Stey (DW1) testified that on 8/1/2005 he applied for a piece of land measuring 20 acres from Makuyuni Village for the purposes of constructing a TEHAMA college. That he did so vide a letter, exhibit D1. That on 15/01/2005, the Village Assembly convened a meeting and resolved to award him 10 acres of land. On 21/1/2005, he was issued with a letter from the VEO (exhibit D2) informing him that the Village Assembly approved his allocation. His evidence was that he was allocated a land from the holding ground and that the Plaintiff was allocated 10 acres of land from the Herman Steyn's area. Mr. Stey stated further that in 2015, TANESCO intended to install a 400KV power line project which was passing over his piece of land. He had to go to his land so that he would be compensated. That there was no dispute over that land until December, 2016 when he received a letter from the Plaintiff contending that he trespassed to her land. Mr. Stey added that the minutes tendered by the Plaintiff related to a piece of land other than the suit land. He therefore prayed to be declared the lawful owner of the suit land.

Lucy Sanka (DW2) and Silanga Kalasinga (DW3) testified for the 1<sup>st</sup> Defendant. They told the Court that the suit land belongs to DW1. According to DW2, the 2014 Village General Assembly divided 1500 acres of land known as Herman Steyn's land, in which the Plaintiff was allocated 10 acres. After the allocations, the investors were given conditions, including a condition to make some payments for their pieces of land. Some were to pay 2 million shs, others 2.5 million shs and others 5 million shillings. DW2 who was a member of the Village Council stated that the Plaintiff did not pay for the

land allocated to her. DW3 added that he has his 2 acres of land at the holding ground bordering Lowasa Secondary and that DW1's is his neighbour. He added that the Village Assembly which allocated him that piece of land took place in August 2005.

Grace Alex Mayunga (DW4), the Village Executive Officer of Makuyuni village and Reginald Robert Tesha (DW5), Monduli Town Planner were summoned to testify on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, respectively. They testified that the area known as Herman Steyn which was 3000 acres was taken by Government in 2005. 1500 acres was given to investors and the rest was given to cattle grazers. According to DW4, Holding Ground area, belonged to the Ministry for Water and Livestock Development prior to May 2005. That Monduli District Council applied to get it from the Ministry for the purpose of constructing a school and developing Makuyuni town. The Ministry gave it to Monduli District Council on 6/5/2005. According to DW4 and DW5, any person who says that he was allocated land at the Holding Ground in January 2005 will be lying because at that time the land did not belong to the 2<sup>nd</sup> or 3<sup>rd</sup> Defendants. DW4 added that the Plaintiff and other investors were allocated land at Steyn's land, and it was given to them on conditions in such a way that they were to sign contracts as per the resolutions. The land subject of this case, according to DW4 and DW5, belongs to the government. On cross examination about what they had stated earlier, DW4 stated that her office was not involved in the preparation of the Written Statement of Defence. DW5 argued that exhibit P3 which was payment bills is invalid because it is not signed by the land officer nor was it stamped. He added



further that there were no receipts of the payments to prove that the District Council received payments.

The 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants also filed their final submission through Mr. Mkama Musalama, the learned State Attorney. The learned State attorney submitted that the 1<sup>st</sup> Defendant's claim of being allocated land on 21/1/2005 as per exhibit D2 was impossible to fathom as at that time the land belonged to the Ministry of Water and Livestock Development, as per the evidence obtained from PW2, DW4, DW5 and exhibit P10. The learned State Attorney contended that a person with no good title cannot pass title. To support his argument, he cited the case of ***Abdallah Said Masoud Vs. Gharib Suleiman and 5 Others***, Land Case No. 398 of 2016, HC Land Division DSM (unreported) and ***Bishopgate Motor Finance Corporation Ltd Vs. transport Brakers Ltd*** (1949) 1KB 322.

Mr. Musalama further argued that there were inconsistencies on the evidence of the Plaintiff as she claimed that the Village General Assembly meeting which sat 20/1/2009 approved the application of two investors; namely, Mary Lema and Hadija Ally, and on 21/5/2014 Village Assembly approved the application of the Plaintiff on the same land. He submitted that those mentioned in exhibit P5 state that they were allocated land at Steyn's land while the Plaintiff claims that she was allocated in the holding ground. Therefore, according to the learned State Attorney, the Plaintiff has failed to prove the case on the required standard. On that account he cited the case of ***Bakari Mhando Swanga Vs. Mzee Mohamed Bakari Shelukindo &***

**2 Others,** Civil Appeal No. 389 of 2019 (unreported). Furthermore, he argued, the Plaintiff was allocated the land on condition that she was to sign a contract which she did not sign. He referred to the evidence of DW4, PW2, exhibits P5 and P6. The learned State Attorney therefore urged the Court to hold that the suit land belongs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, as neither the Plaintiff nor the 1<sup>st</sup> Defendant proved ownership over the suit land.

From the above testimonies as well as the exhibits tendered it is an undisputed fact that the Plaintiff applied for a piece of land measuring 20 acres from the second Defendant on 30/7/2007. This is exhibited by exhibit P1. The Village Council in their meeting convened on 8/2/2013, allocated her 10 acres out of the 20 acres requested, and the allocation was approved by the Village General Assembly on 21/5/2014. To materialize the resolution made by the Village General Assembly, the Plaintiff was issued with a letter (exhibit P6) informing her that her application had been approved by the Village General Assembly.

The Plaintiff's testimony and the submissions are to the fact that as soon as the Plaintiff's allocation was approved by the Village Assembly, she automatically became the owner of the suit land. They are backed up by section 8(5) of the Village Land Act, Cap. 114 [R.E 2019], which provide:

*"A village council shall not allocate land or grant a customary right of occupancy without a prior approval of the village assembly."*

Guided by the above provision, the Plaintiff and her advocate are of the view that since the Village Assembly approved the Plaintiff's allocation as per

exhibit P5, it then follows that the Plaintiff became the lawful owner of the suit land with immediate effect. The powers of the Village Assembly to allocate land to either villagers or investors, may be subject to conditions. The law gives powers to both the Village Council and the Village Assembly to grant land subject to conditions. Section 23(3)(a) of the Village Land Act provides:

*"A village council shall after considering application in accordance with subsection 2;*

*a) Grant in respect of all or part of the **land applied for subject in conditions** which-*

*i) **are set out in section 29 or which may be prescribed...**"*

Other conditions are creatures of the law as specified under section 29 of the Act, such as payment of fees, charges, rent and taxes, keeping and maintaining the land in good state and so forth.

While allocating land to the Plaintiff (and other investors) the Village Council meeting as well as the Village Assembly gave the following resolutions as provided in page 7 of exhibit P5:

*"AZIMIO LA MKUTANO MKUU WA KIJJI 21/5/2014*

*a) Wawekezaji wote walipitishwa/waliidhinishwa kupewa kiwango cha ardhi walichoomba;*

*b) **Mikataba yote iandaliwe na kusainiwa mbele ya mkutano mkuu;***

*c) Kila mwekezaji atoe ushirikiano kwa jamii na ofisi;*

*d) Kila mwekezaji atachangia shughuli zote za maendeleo ya kijiji;*

*e) Taratibu zote za kupata hatimiliki zitashughulikiwa na mwekezaji mwenyewe **mara baada ya kukamilisha mikataba kati ya kijiji na mwekezaji ndipo aanze kuendeleza.**"*(emphasis added)

Again, exhibit P6 which is a letter from the Village Executive Officer to the Plaintiff informing her that her application was approved by the Village Assembly under the third bulletin reads:

*"Hivyo taratibu za mikataba zitafuata mara baaada ya kuoneshwa eneo hilo ulilopewa."*

The above prescript signifies that the resolution of the Village Council and Village Assembly were not conclusive, as there were still other conditions to be adhered to by the Plaintiff so as to finalize the process of ownership over the suit land. As shown above, there were agreements between the village and the Plaintiff yet to be signed. This is apt to what was testified by DW2, DW4 and DW5. I subscribe to their line of argument that title of the suit land had not passed from the 2<sup>nd</sup> Defendant to the Plaintiff as some of the conditions were not complied with. Signing of a contract for an applicant of land is a legal requirement as provided under section 24 of the Village Land Act. Despite of the express provisions of the resolutions and the letter, no evidence was led to prove that there exist contracts that allocatees of land do sign. The Village Assembly Chairman and the VEO both appear to suggest that such contracts do not exist, let alone the fact that such contracts be signed during the village assembly sitting.

The payments the Plaintiff was required to pay as provided under exhibit P3 is another proof that the land had not passed to the Plaintiff. All the payments the Plaintiff was supposed to pay in order to be granted ownership could not be proved that they were not paid as there are no receipts to prove payment of the same. Also exhibit P3 was neither signed by the land officer

nor stamped. This makes exhibit P3 weak, and essentially invites a conclusion that the conditions were yet to be not complied with.

Again, the evidence is silent as to when the Plaintiff was shown the suit land because according to exhibit P6 the land would be shown to her after signing the contract. Unknowingly, the Plaintiff commenced the processes of surveying the suit land and she was in the process of developing it while the contracts were yet to be signed. That suffices to hold as rightly submitted by Mr. Musalama that the Plaintiff had not completed the process of acquiring the suit land from the 2<sup>nd</sup> Defendant.

As far as the 1<sup>st</sup> Defendant is concerned, his sole reliance to prove that he was allocated the suit land by 2<sup>nd</sup> Defendant is exhibit D2 a letter purported to originate from the Village Executive Officer dated 21/1/2005 confirming his allocation by the Village Assembly. The other evidence is the testimonies of DW2 and DW3 who testified that the 1<sup>st</sup> Defendant was allocated 10 acres of land in the Holding Ground. DW3 stated that he also has 2 acres bordering the 1<sup>st</sup> Defendant.

From the evidence on record, even if the 1<sup>st</sup> Defendant was to be believed, his allocation over the suit land was not legally procured. I say so because as intimated earlier on, allocation of village land has to be accomplished by the Village Council and the Village Assembly in according with section 8(5) of the Village Land Act. Proving that the land was allocated to the applicant by the village, he has to produce minutes of both the Village Council and the

Village Assembly and their resolutions allocating the land. This is a requirement of law. The Court of Appeal in the case of ***Udhagweha Bayai and 16 Others Vs. Halmashauri ya Kijiji Cha Vilima Vitatu and Another***, Civil Appeal No. 77 of 2012 (unreported) stated:

*"In conclusion therefore, in the absence of any record of the meetings of 11/12/1999 and 14/12/1999 it will be fair to say that there is no material upon which we could safely say that the allocation of the land in question was made in compliance with the dictates of the law as stipulated above. In other words, there is nothing to show that the village council and village assembly were involved in allocating the land in issue ..."*

In the absence of the minutes of the Village Council and the Village Assembly, it is impossible for the 1<sup>st</sup> Defendant to satisfy the Court that the suit land was allocated to him by the 2<sup>nd</sup> Defendant. This would be taking away the powers of the Village Council and Village Assembly in allocating land.

The other solid evidence to water down the 1<sup>st</sup> Defendant's evidence is exhibit P10 which was tendered by PW2 showing that on 21/1/2005, the date the 1<sup>st</sup> Defendant claims to be allocated the suit land, the Holding Ground land was still under the ownership of the Ministry of Water and Livestock Development. Exhibit P10 shows that the Holding Ground land, comprising of 510 hectares, was handed to Monduli District Council for the purpose of constructing a school and expansion of Makuyuni Town on 6/5/2005. It therefore follows that any allocation made prior to 6/5/2005 would be considered illegal as the land did not belong to the 2<sup>nd</sup> Defendant at the time. Since the 2<sup>nd</sup> Defendant had no title over the holding ground

area at the time the 1<sup>st</sup> Defendant was allegedly allocated the land, it could not transfer the title that it did not have. At this juncture I am fortified by the Court of Appeal decision in ***Abdi M. Kipoto Vs. Chief Arthur Mtoi***, Civil Appeal No. 75 of 2017 (unreported) where the court observed:

*"In the case at hand, there was no evidence brought before the Ward Tribunal to show that the procedure under the provisions of section 45 of Cap 114 was followed. **Given the ailment, we are of the considered view that the allocation of the disputed land to the appellant was illegal. Therefore no good title passed to him by the purported allocation.**"* (emphasis added)

See also; ***Paschal Maganga Vs. Kitinga Mbarika***, Civil Appeal No. 240 of 2017; ***Yusuph Juma Sadiki & Another Vs. Nuru Mohamed Kihyo & 2 Others***, Land Case No. 26 of 2008 (both unreported) and ***Abdallah Said Masoud Vs. Gharib Suleiman and 5 Others*** (supra).

There is yet another defect which further increases doubts over the 1<sup>st</sup> Defendant's ownership of the suit land. That emanates from exhibit D2 itself. One, the alleged letter from the late Mesarieki Saitabau, who was the VEO of Makuyuni Village at the time the land was allegedly allocated to the 1<sup>st</sup> Defendant, did not disclose the name of the maker right after his signature. That is in contrast with similar letters as exhibited in exhibits P5 and P6. That is the practice in all official letters. This implies that the writer of the purported letter is unknown, as his name is missing. Two, although there was no handwriting expert report, the signature of the said Meserieki Saitabau in exhibit D2 appears different when compared to his signatures appearing in other documents that he signed, including exhibits P11 and

P14. Lastly, the contents of the said exhibit appear to be in clear contradiction with the evidence of the 1<sup>st</sup> Defendant. In his testimony, DW1 stated that in the meeting that was convened by the Village Assembly on 15/1/2005 one of the agenda they discussed concerned the contributions for construction of Lowasa Secondary School. When cross examined, DW1 stated that Lowasa Secondary School was not yet constructed at that time. What is surprising is that the letter mentions the land he applied near Lowasa Secondary which was yet to be constructed.

Those contradictions coupled by the evidence of DW3 who alleged to be DW1's neighbour who stated that the Village Assembly meeting that allocated the land was convened in August 2005 renders the exhibit unworthy of belief.

Before leaving the evidence regarding the 1<sup>st</sup> Defendant, I should point out that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants originally supported the ownership of the 1<sup>st</sup> defendant over the suit land. Clause 12 of the Written Statement of Defence of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants categorically state that the suit land is the lawful property of the 1<sup>st</sup> Defendant. Later on, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants changed their mind and retracted what they had averred in their pleadings. I am also alive that in his final submission Mr. Kamazima drew the attention of the Court on the fact that DW4 and DW5 departed from what they averred in their joint WSD, which is against the rule of pleadings. I agree with Mr. Kamazima in principle.



In ***Yara Tanzania Limited Vs. Charles Alloyce Msemwa t/a Msemwa Junior and 2 Others***, Commercial Case No. 5 of 2013, Commercial Court, DSM (unreported) the court observed:

*"It is a cardinal principle of law of civil procedure founded upon prudence that parties are bound by their pleadings."*

See also **James Funke Gwagilo Versus Attorney General** [2004] T.L.R 161.

The general rule is that a party is bound by his pleadings and should not be allowed to depart from what he has pleaded in the pleadings. I see no grounds in the instant case for departing from these general rules of pleadings because the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had an opportunity to amend their pleadings denying their previous admissions. They are now therefore bound by their pleadings denying what they pleaded in their joint WSD is equally taking the other parties at a surprise, which is susceptible to denying them the right to a fair hearing. Mr. Kamazima implored the court to disregard the testimonies of DW4 and DW5 regarding the ownership of the suit land by the 3<sup>rd</sup> Defendant. I accordingly agree with him as they failed to adhere to the principle of pleadings. I will not deal with their testimonies as they depart from what they had admitted before.

The law is settled that a person who alleges must prove and the standard of proof in civil cases is on the balance of probabilities by weighing the weightier evidence. See ***Geita Gold Mining Ltd & Another Vs. Ignas Athanas***, Civil Appeal No. 227 of 2017; ***Anthony M. Masanga Vs. Penina (Mama***

***Mgesi) & Lucia (Mama Anna)***, Civil Appeal No. 118 of 2014 (both unreported)

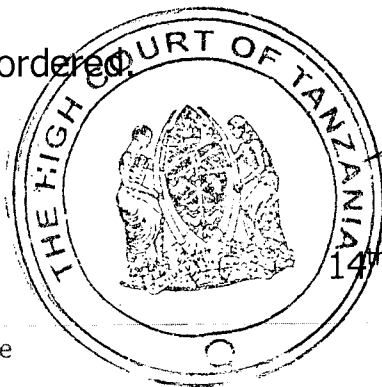
In the absence of the testimonies of DW4 and DW5, coupled with the obvious flaws appearing in the evidence supporting the assertion that the 1<sup>st</sup> Defendant was allocated the suit land, the 1<sup>st</sup> Defendant's claim over the suit land appears weak. There is no scintilla of evidence to support his assertion. He is nothing but a trespasser to the suit land. Regarding the claim by the Plaintiff, her evidence supported by her witnesses and the uncontroverted documentary evidence prove that she was allocated the suit land for the purposes of constructing a school in 2007. There are also no reasons to doubt the evidence that she was obliged to seek endorsement of her ownership over the suit land following change of village leadership. The record of the Village Assembly and Village Council Meetings testify that there were two categories of applicants. The Plaintiff fell in the categories of those who required approval or endorsement as opposed to those who wanted to be allocated land. Nonetheless, she did not follow up for the purposes of fulfilling conditions antecedent to her lawful ownership over the suit land. As there appear to be no deadline set for fulfilment of conditions and, in the absence of evidence of reallocation of the suit land to another investor, the Plaintiff is declared the lawful owner of the suit land subject to fulfilment of conditions set by the Village Assembly. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants should ensure that the necessary documents, including fees and charges, are availed to the Plaintiff.

### **To what reliefs the parties are entitled to?**

The Plaintiff's prayers as per the Plaint include: to be declared the lawful owner of the suit land; an order permanently restraining the Defendants from interfering with her possession and lawful use of the suit land and an order for payment of General damages. From the evidence and deliberations herein, whereas there is no doubt that the suit land was lawfully given to the Plaintiff, her ownership of the suit land is dependent on a number of factors explained hitherto. Further, the Plaintiff did not lead evidence on circumstances that entitles her to payment of general damages. Consequently, the Court grants the following reliefs to the Plaintiff:

- (a) The Plaintiff is declared the lawful owner of the suit land subject to fulfilment of the conditions set by Makuyuni Village Assembly dated 21/5/2014 and the letter of the Village Executive Officer dated 27/5/2014;
- (b) The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant shall ensure that the necessary documents, including fees and charges, are availed to the Plaintiff to enable the fulfilment of conditions mentioned in (a) above;
- (c) The 1<sup>st</sup> Defendant is hereby declared a trespasser to the suit land; and
- (d) Costs of the Plaintiff to be born by the Defendants in equal proportions.

It is so ordered.



*Y. B. Masara*  
Y. B. Masara

**JUDGE**

14<sup>th</sup> December, 2020