IN THE HIGH COURT OF TANZANIA

MWANZA DISTIRCT REGISTRY

AT MWANZA

LAND CASE No. 17 OF 2018

THE REGISTERED TRUSTEES OF PENTECOSTAL

EVANGELISTIC FELLOWSHIP OF AFRICA..... PLAINTIFF

VERSUS

ILEMELA MUNICIPAL COUNCIL.....1ST DEFENDANT
MAJURA MAFURU.....2ND DEFENDANT
EMMANUEL COLNERL.....3RD DEFENDANT
SHABAN KIGOGOMA.....4TH DEFENDANT
ROBERT ELIAS BUDEBA.....5TH DEFENDANT
CHACHA NYITUGA.....6TH DEFENDANT
MOROKO SAMWEL.....7TH DEFENDANT
MANENO MRISHO.....8TH DEFENDANT
SELEMAN RAMADHANI.....9TH DEFENDANT
JACLINE LAZARO.....10TH DEFENDANT
IDDI MUSSA.....11TH DEFENDANT
CHARLES MDAYAHOZE.....12TH DEFENDANT
JAFARI MOHAMED.....13TH DEFENDANT
EBENEZA YOTAM.....14TH DEFENDANT
AYUBU MEDADI.....15TH DEFENDANT
ABDALLAH KHASAN.....16TH DEFENDANT
HERYMICK CHAGULA.....17TH DEFENDANT
CHARLES MALEBO.....18TH DEFENDANT
SIKITU LUGUTU.....19TH DEFENDANT
SAGANA MALUNGU.....20TH DEFENDANT
ROMWADI JONAS.....21ST DEFENDANT

MWITA MKONO.....22ND DEFENDANT
LUCAS JOHN .....23RD DEFENDANT
SHIJA NDUNGILE.....24TH DEFENDANT
MAKOMANGO MADUHU.....25TH DEFENDANT
NAHMAN MUSSA .....26TH DEFENDANT

JUDGMENT

10th March & 30th April, 2021
TIGANGA, J

The plaintiff in this case, a religious organization, residing and carrying out its activities within Mwanza region, which among others, maintains a Bible College located at Pasiansi Mwanza, the first defendant a Local Government Authority established and governed by the Local Government (Urban Authorities) Act, [Cap 288 R.E 2019] and in respect of this matter is the successor of the Mwanza Municipal Council while the 2nd to 26th defendants are individual natural persons living and working for gain in Mwanza and claiming to be on the disputed land.

The plaintiff sues the defendants for the following orders:

(a) A declaration orders that the plaintiff is the lawful owner and a forceful order to be granted title deeds as a true owner,

(b) The trespassers be evicted from the suit land,

(c) That whatever has been constructed and built on the suit land by the defendants if any, be demolished forthwith,

(d) Costs of the suit,

(e) Any other or further relief (s) the court may deem fit.

The cause of action in this case traces its background on 27/09/2002 during the graduation ceremony at the Bible College maintained by the plaintiff, the plaintiff requested from the Guest of honour, the District Commissioner who went there representing the Regional Commissioner, the land to extend their college and church building at Kiseke area in Mwanza Region.

The district commissioner wrote a letter to the Mwanza City Director informing it the request posed by the plaintiff. In its response the City Council agreed to allocate them the land but advised them to pay for the demarcation and survey costs which they did, before the area was surveyed by the then Mwanza City Council resulting into formation of among others plots No. 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1735, 1736, 1739, 1740, 1741, 1742, 1766, 1767, 1768, 1769, 1770, and 1771 Block "B" Kiseke Ilemela Mwanza.

That was followed by the valuation of the land and properties on the surveyed plots and the plaintiff was required to pay compensation to the indigenous or original owners of the surveyed land, the requirement which was dully complied with as exhibited by the compensation schedule, annexed to the plaint. Therefore following payment of compensation the plaintiff became the lawful owner of the land. However the plaintiff has unjustifiably never been given any official ownership of the land in dispute by the first defendant despite the numerous follow ups done by the plaintiff.

To the surprise of the plaintiff, on 14th day of April, 2015 the 1st defendant wrote a letter to the plaintiff that the plots in dispute have been resurveyed, re registered as No. D12237/77 and that the said registration was purposely done for the plaintiff to acquire their title deeds.

On 25th day of July 2015 a meeting was held between the officials from the 1st defendant and street leaders together with neighbor and the representative of the plaintiff at the disputed plot and recommended that the plaintiff be allocated the said plot. Despite the recommendation after sometimes the plaintiff realized that the suit plot has been invaded by the trespassers the (the 2nd to 26th defendant) and the 1st defendant has

proceeded to conduct and caused to be conducted a squatter upgrading on the suit land commonly known as (upimaji shirikishi) whilst knowing that the suit land was surveyed way back 2003/2004.

According to the plaintiff, after the trespass and squatter upgrading of the land in dispute, the 2nd to 26th defendants have now built or have started building houses on the land in dispute in the detriment of the plaintiff who is the lawful owner.

Following that state of affairs, the plaintiff decided to sue the defendants, and as a matter of procedure he served the 1st defendant with the notice requiring them to settle the claim or else to face a legal action in a court of law, but despites that notice, the defendant has refused and or neglected to settle the claim.

According to him, the cause of action arose in Mwanza and the value of the claim is estimated to be Tshs. 350,000,000/=.

Only the two defendants that is the 1st and 17th defendants filed their separate written statements defence. In his written statement of defence, the 1st defendant did not dispute to have been requested to allocate land by the plaintiff, to require the plaintiff to pay the costs of survey,

demarcation and compensation of the surveyed plot. It was also averred that not all the surveyed land was compensated by the defendant; therefore they do not automatically belong to the plaintiff.

It was also admitted that the valuation was conducted and the plaintiff was advised to pay compensation to the affected owners, but he never paid compensation to all original owners and was informed of the existing dispute with original owners who were not duly compensated by the plaintiff.

It was averred further that the plaintiff and the defendant agreed to resurvey following a serious dispute that emerged between the plaintiff and the original owners. That resurvey affected two plots of Joseph Sheja, two of Lucas Mashilanga the dispute which still subsists.

It was averred that the 1st defendant does not condone invasion if any, but it maintain that it can not be held responsible, to prove that it does not condone the invasion, the 1st defendant has prayed the big role in settling the dispute, before issuing the Tittle Deeds but the dispute remained unresolved.

The other defendant who filed the written statement of defence is the 17th defendant. In his defence he disputed to have trespassed the disputed land. He averred that his plot is not amongst the plot in dispute allegedly owned by the plaintiff as his plot has never been subjected to some compensation by the plaintiff or any one else.

He in the end, asked for the claim against him to be dismissed with costs and the Court be pleased to grant any other relief as it may deem fit.

Physical service to the rest 24 defendants was not possible. This was after some had refused to be served, while others were not found at all as exhibited by the submission made by the counsel for the plaintiff on 23rd day of July 2020. Following that state of affairs, on that very date, the court ordered the 24 defendants to be served by way of publication. In compliance with that order, on 01st Sept, 2020 the summons was published in the Mwananchi News paper. Yet still, the 24 defendants did neither file the Written Statement of Defence nor appear to defend their case.

Before hearing had started, four issues were framed as follows;

(i) Whether the plaintiff is a lawful owner of the suit land?

(ii) Whether the 1st Defendant has unreasonably failed to issue the certificate of title to the plaintiff?

(iii) Whether the 2nd to 26th Defendants are trespassers to the suit land?

(iv) To what reliefs are the parties entitled from the court.

The plaintiff called two witnesses namely John Mwanzalima and Yohana Mwita who testified as PW1 and PW2 respectively and tendered 12 exhibits while the defence called two witnesses namely William Lucas Magoha who testified for the 1st defendant, and Herymick Chagula, the 17th defendant, they testified as DW1 and DW2 respectively.

In his evidence PW1, after first narrating how they requested the land from the guest of honour, he told the court that they were advised to write a letter requesting the land for extending their college and building the church. In complying with that directive, they wrote a letter exhibit P1 asking for a land measuring between 20 to 50 acres.

The District Commissioner in insistence to their request also wrote a letter exhibits P2, (which the plaintiff was given a copy), to City Director directing him to give the plaintiff the land they requested. The request was granted by the City Director through exhibit P3 and the council was ready

to allocate the plaintiff the land at Kiseke but subject to contributing the costs for survey and demarcation. He said they paid Tshs. 1,320,000/= as the amount for initial survey and mapping, that was proved by exhibit P4 and P5.

Thereafter they were given the detailed costs analysis which required them to pay Tshs. 3,262, 000/= as full the costs for survey which they also paid as exhibited by the receipt exhibit P6. After paying the costs, the survey started and continued up to 22 February 2005 when they were informed by a letter exhibit P7, that they were supposed to pay compensation to the people who were in occupation of land before the survey. According to him they were supposed to pay more than 4,000,000/=.

Thereafter they were given a letter exhibit P8 with a list of nine people who were supposed to be paid compensation, and they paid them all as indicated in the schedule, exhibit P9, the schedule which was approved by the Regional Commissioner Mwanza, District Commissioner, Ilemela and City valuer. The payment was witnessed by Shigella, the chairperson of the area who proved to witness the payment by his letter

exhibit P11 which he addressed to the Municipal Director and copied to the plaintiff.

He said the surveyor was the one who told them the names of the persons who were supposed to be paid compensation. After paying they went there for inspection of the plots together with the officers from the 1st defendant and thereafter they were given a letter for confirmation of inspection which is exhibit P10 in which it was recommended that he be given the title deed.

He said out of the surveyed plots, only 26 were in dispute; he mentioned the plots to be plots No. 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1735, 1736, 1739, 1740, 1741, 1742, 1766, 1767, 1768, 1769, 1770, and 1771 Block "B" Kiseke Ilemela Mwanza.

He submitted that the 2nd to 26th defendants trespassed the land because the 1st defendant did not give the plaintiff title deed. He said despite the fact that they asked the 1st defendant to stop the invaders; the 1st defendant did not do so. At the end he asked for the court to grant the following reliefs;

i) A declaration that the suit land is the property of the plaintiff PEFA,

ii) An order for eviction against the 2nd to 26th defendants,

iii) First defendant compensate the plaintiff,

iv) First defendant find the plaintiff the other land and relocate them,

v) The court gives a time frame on how and when prayer number 4 above will be fulfilled.

On cross examination by the counsel for the 1st defendant, he said they were supposed to pay Tshs. 4,185,285/= and but according to exhibit P9 they paid only Tshs. 3,860,652/= and that they paid eight people as reflected in the document.

Further to that, he said from the exhibit P9 the size of the area is 7.52, acres but they claims 6 hectors which is equivalent to 14.82 acres. That, although exhibit P10 mentions 26 plots to be in dispute listing the numbers of the plots, the plots starting No. 1735 to 1771 are not on the inspection report.

He said the plot was intruded into and he is not sure who gave the plot to the intruder but they do not know who allocated the plot to the

intruders. He said the claimed area is at the hill, which covers plot No. 1590 he said it is a huge plot with the size of 6 hectors it was formerly belonging to Mashilanga who was paid compensation. However in further examination he said the District Commissioner one Gachocha said the hill can not be compensated because it is a hill, but although it was not compensated, it was surveyed for the use by the Plaintiff, and that they are informed that currently the area has about 200 occupants.

He said the prayer to be given alternative plot was not pleaded but it was asked out of the PW1 wisdom, he said he is not ready to be given the alternative plots at the plaintiff's costs, he prayed the 1st defendant to pay the survey costs.

When further cross examined by the 17th defendant, he reiterated that the hill was not compensated; he said trespassers are on the hill and other area.

On re examination he said the government was the owner of the hill, it was not compensated because it cannot be owned by individual, but the government which was owning the hill surveyed it and allocated it to the plaintiff.

Further to that, he said he was the one who paid the compensation. He said that he does not know why the chairman said the person who were paid were 11. He said the plot he is claiming are 26 including 1590.

PW2 who introduced himself as the employee of the plaintiff narrated how they requested land from the 1st defendant, and that he was the person who made follow up and on 14/04/2015 was given a letter exhibit P12 from the City Director informing the plaintiff that the land they requested had already been surveyed for allocation to the plaintiff. He was just given that letter to take it to the Bishop. He said following that information, payment of compensation was done to those who were entitled. To his understanding one of the persons who were paid compensation is Lucas Mashilanga, and it is said that he was the one owning the hill, as the hill was referred to as "Mlima wa Mashilanga."

On cross examination by the counsel for the 1st defendant he said they had already paid compensation and survey costs but they have not paid the ownership costs. He said he knew that there was a dispute between the plaintiff and Josephat Shega who trespassed, and heard that there is a resurvey conducted and that the resurvey was for purposes of

creating the road. He said the survey was conducted at the area where they paid compensation.

When he was cross examined by the 17th defendant, he said the hill had one plot, that is Plot No. 1590 and the whole plot was six acres. He said Mashilanga had other area measuring 4.2 acres for which they paid compensation. That place was not part of the hill plot 1590, but said on the hill they compensated some of the owners like three plots, he said the Hill was also allocated to the 1st defendant, but they did not compensate Lucas Mashilanga on the hill.

In re examination, he said they paid according to the schedule submitted to them by the 1st defendant, but he believes the hill is also theirs. That marked the plaintiff case, hence defence.

The defence started with the evidence of William Lucas Magoha DW1, who introduced himself as the surveyor of Ilemela Municipal Council, working in the planning and survey department. After telling the court his responsibilities, he informed the court that the plaintiff wrote a letter asking to be allocated land; they were given conditions that they had to foot the cost of survey of the said land. He said after paying initial survey costs, the Municipal Director instructed him and the land officer to inspect

the area and prepare a report of what plots were in dispute which one were not, and recommend the allocation and issuing of the title deed. In so doing they informed the street chairman and neighbours as well as the plaintiff to be at the site. He said that the plaintiff was represented by one Pastor Yohana.

While there, they asked the plaintiff to show them their land and started to show one plot after the other. Thereafter they prepared the town planning, drawing or layout and the drawings they prepared was for the whole area. After visiting the area they discovered that the whole area had a total of 29 plots, some of the plots were encroaching to another neigbours plots therefore they advised them to negotiates, but about 18 plots had no dispute. With the plots which were not in disputes they advised the plaintiff to visit the municipal office and takes invoice but they did not do so in time. Instead the plaintiff went there after three months, with the new claim of resurvey. The resurvey was done in 2017 at the request of the plaintiff on the ground that the houses they built were built on the road reserve; the resurvey intended to shift the road.

He said the resurvey brought out the dispute between Lucas Mashilanga and Mwalim Sheja, because after the resurvey the road

encroached in the land of these two persons. He said plot No. 1590 was surveyed, but it was for public use. It was not owned by the said Lucas Mashilanga, it was under the street government and Lucas Mashilanga was just a care taker of the hill which after survey it resulted into Plot No. 1590. That plot was just adjacent with the plot allocated to the plaintiff. Plot 1590 is more than 10,000 square meters. He said other plots No. 1770 and 1771 were the properties of others.

He said that it is true that the plaintiff has not been given the title deed, but they are ready to give the title deed for the plots which had no dispute, he urged them to settle with those who are the original owner of the plots.

He said plot No. 1577 to 1589 they are not in conflict, they can be given the title deed while plot No. 1590, 1735, 1770, and 1771 are on the area owned by other person.

He said plot No. 1590 was invaded by the people who use it as the residence by erecting thereon residential building. After they have realized that the intruders have occupied the whole of plot No. 1590, the council decided to do what they call participatory survey "Upimaji Shirikishi" or formalization of residence, "Urasimishaji Makazi." That survey disintegrated

plot 1590 into small plots bearing new plots numbers. According to him, this is normally done to people who are on the land and have already developed their land, the main aim being that all land should be in use so that and the government can collect its taxes.

The plaintiff also had about 2000 or 2500 square meters, they were also allowed and they surveyed the plot into more than one plots. He said the responsibility to guard the land is of the owner of the land not of the allocating authority.

On cross examination by the plaintiff he said the plaintiff applied for 20 to 50 acres, but was allocated only five acres, though the surveyed land was bigger than that. He said he did not remember the number of people who were compensated. He said he was not present when the survey was conducted and tendered no sketch map to show the area which was surveyed. He also tendered no document to show that the area to be allocated was less than 20 acres. He said the area is in block B and had more than 60 plots but other plots were allocated to other people and that everyone paid depending on the area he owned. He said the plaintiff is entitled to be given the title of the plots which are not in dispute.

Further to that, he said the land which has already been surveyed can be resurveyed as long as the procedures are followed. However he said the previous map has never been revoked, but the revocation process is on progress.

He said the plot which was recommended to be allocated to the plaintiff were 29 and only two plots had houses, but he was not supposed to be allocated plot 1590. He said the resurvey aimed at resolving the dispute which involved the plaintiff.

In re examination, DW1 said the size of the land is determined by the money paid for compensation. He said plots No. 1590, 1770 and 1771 were not compensated as not all the plots which were surveyed were of the plaintiff. He said every land owner needs to safe guard his interest in land. In concluding he said they stopped the process of revocation because of this case, and that they did not issue title deeds because the plaintiff has never paid for the same and has not furnished the details like photo pictures necessary for preparation of the same.

DW2 said he owns a portion of land measuring 25*60 which is equivalent to 1500square meters in plot No.1590 which is located at the hill. He has been owning the plot since 2011 when he bought it from one

Kulwa Mashaka before the street leadership when the area was still called Nsumba. Together with him, there are about 300 other owners, who are just like him have developed their portions by building the residential house and all have never received any compensation. He said the first survey was conducted without informing them. However he said the land which was allocated to the plaintiff is distinct from plot No. 1590.

In the effort to prove the case in his favour he tendered the sale agreement allegedly entered between him and the person who sold him the plot. The same was objected on the ground that it was not attached to the Written Statement of defence, DW2 insisted that the same was attached to the written statement of defence. However, when I perused the copy of the WSD in the court record, I found the copy was attached but it was not pleaded in the WSD, I however admitted it as exhibit D1 but subject to scrutiny of discuss its evidential value at this stage.

When he was cross examined, he said the person who sold him the land inherited it from his parents. He said the land is in Nyabusalu in Kiseke ward and when the street was established Robert Budeba was the first chairperson. He on re examination prayed to be declared the owner of the land. That marked the defence case as well hence this judgment

That being the comprehensive summary of pleading and the evidence by the plaintiff and the first and seventeenth defendant, I will now straight away start to discuss the first issue as framed. This issue is whether the plaintiff is a lawful owner of the suit land?

In this country, land ownership is regulated by Land Act, [Cap 113 R.E 2019] or Village Land Act [Cap 114 R.E 2019]. While Land Act regulates the ownership under the granted right of occupancy, the Village Land Act regulates the ownership under the deemed right of occupancy. In this case the plaintiff claims to be the owner of the land on a surveyed area and that the land he owns has been trespassed into by the 2nd and the 26th defendant.

The plaintiff claim his land which has been trespassed into to be plots Nos. 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1735, 1736, 1739, 1740, 1741, 1742, 1766, 1767, 1768, 1769, 1770, and 1771 Block "B" Kiseke Ilemela Mwanza.

The evidence is clear that the plaintiff was not an original owner of the land in disputes, but acquired the rights, after he had requested to be allocated the land for church related use through exhibit P1. When his request was granted, he was told to do two things, **one**, to contribute by

way of cost sharing the costs for survey and planning as indicated in exhibit P3, which the plaintiff paid as per exhibit P4, P5 and P6. **Two**, to pay compensation as per valuation report to the tune of Tshs. 4,185,278/= as per exhibit P7 which compensation was supposed to be paid to nine people namely, **Lucas Mashilanga, Mustapha Mashilanga, Laurent Kasubi, David Kasubi, Helena Lubatula, Mussa Meshaki Bundu, Lubigisa K. Sanane, Charles Malebo** and **Anna Makomba** as per exhibit P8 with the amount to be paid per each beneficiary as indicated in the exhibit P.9, the compensation schedule. This means the right of the plaintiff was subject to payment compensation as directed by section 3(1)(f) and (g) of the Land Act [Cap 113 R.E 2019].

Now according to exhibit P10 the plot which were supposed to be allocated are as follows: plot Nos. 1554, 1556, 1558, 1560, 1562, 1564, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, Block "B" Kiseke Ilemela Mwanza. These plots are the ones which the inspection committee inspected and recommended to be allocated to the plaintiff. It means, these are the plot which the plaintiff was supposed to pay compensation.

In the list contained in exhibit P10, plots Nos. 1589, 1590, 1735, 1736, 1739, 1740, 1741, 1742, 1766, 1767, 1768, 1769, 1770, and 1771 are not on the list of the plots which were inspected, and recommended that they be allocated to the plaintiff. This means these plots were not compensated and where not in the plan to be allocated to the plaintiff. Since the ownership was subject to the payment of compensation, therefore the plaintiff can not at any given time claim to be the owner of the said plots.

However plots Nos. 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588 are on both lists, a list of the plots which were inspected and recommended that they be allocated to the plaintiff, obviously their compensation were paid, and the lists of the plots which are alleged to be trespassed by the defendants.

As no body among the defendants has shown up and say that he is the owner of the plots, this court declares that the said plots Nos. 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, and 1588 are the properties of the plaintiff, while for the reasons given herein above, plots Nos, 1589, 1590, 1735, 1736, 1739, 1740, 1741, 1742, 1766, 1767, 1768, 1769, 1770, and 1771 are not the properties of the plaintiff.

The second issue is whether the 1st Defendant has unreasonably failed to issue the certificate of title to the plaintiff? From what I have indicated above, the plaintiff is not certain with which of the plots he pleaded are his and which ones are not his? The first defendant action to issue certificate of title depends much on the action by the plaintiff, in other words for the 1st defendant to act, he must be moved by the plaintiff.

As indicated above, the ownership depends on compensation, the plaintiff did not compensate the people he sued, but compensated nine people who are not parties to this case, it seems that he also demands to be given the title deed of 14 plots which he did not compensate and are not on the list of the of the plots in exhibit P10 which were inspected by the inspecting team, and which were recommended that the plaintiff be allocated, in the circumstances, and taking into account the fact that the plaintiff has not paid for costs of preparation of the title deed, it can not be said that, the 1st defendant unreasonably refused to issue a title deed. He could not have issued the title deed in the circumstances where the there are a number of unresolved issues. The second issue is thus resolved in negative.

The third issue is whether the 2nd to 26th defendants are trespassers to the suit land? Before venturing to resolve the issue, I would rather point out what is trespass? In my search, I have not come across a statutory definition of what is trespass, however the meaning can be found in the dictionary one of which in my opinion carries both legal and conceptual explanation of the term trespass. According to Oxford Dictionary of Law, 5th Edition, Elizabeth. A. Martin, 2001;

> *"Trespass is a wrongful direct interference with another person, or with his possession of land or goods. Trespass to land denotes entering into someone's land without permission with the purpose of residing or using the land which belongs to another."*

From this definition, trespass is where the person who has no right in the land, enter in the land of another who has established his right in the land and use that land or cause damage to the land or properties thereon.

From the definition; for the person to sue in trespass, he must first establish his right in the land he alleges to have been trespassed into. Now the issue is whether in this case the plaintiff has established that he owns the land which is in currently occupied by the 2nd and 26th defendants. From the plaint and evidence it has not been established specifically which

defendant is occupying which plot among the plots alleged to have been trespassed into by the said defendants.

The 2nd to 26th defendants are not among the people who were paid compensation by the plaintiff over the land from which these plots were surveyed. The evidence shows that the plaintiff paid compensation to nine people; we are not informed that after receiving compensation those nine people gave vacant possession of the plots. If they did, definitely the land did fall in the possession of plaintiff, and that is the reasons as to why none of them was sued in this case.

As earlier on pointed out among the persons who were condemned to be trespassers to the land of the plaintiff, only one that is the 17th defendant appeared and defended his case. The rest did not appear and defend their case, their case were therefore heard exparte. The 17th defendant said the land he is occupying formed part of plot No.1590, which is located at the hill, that fact was not disputed by the plaintiff. What the plaintiff struggled to establish was that the document tendered by DW2 as exhibit D1 is not authentic and that it was not pleaded. It should be noted that the said exhibit was admitted subject to its evidential value to be examined at this stage of judgment. Having examined the document, I can

locate two setback which are apparent, that although the exhibit was found attached to the written statement of defence filed by the 17th defendant, but throughout the said written statement of defence it was not pleaded, I entirely agree with the plaintiff that the same was not pleaded in any paragraph. It is a cardinal principle that a document which has not been pleaded in the pleadings cannot be entertained without the party seeking to rely on the exhibit has first being given notice of intention to rely on additional document. Without going to the authenticity of the document, it goes without saying that the said document cannot be relied upon as it was un procedurally tendered.

However, the rejection of the document does not entitle, the plaintiff victory over the land allegedly occupied by the 17th defendant. Sections 110, 111 and 112 of the Evidence Act [Cap 6 R.E 2019] read together with section 3 (2) (b) of the same law, provides for the burden and standard of proof to the effect that, the burden of proof is on the shoulder of the person who wishes the court to rule in his favour on certain facts.

Further to that, on how and to what extent should the burden be discharged, I find very useful, a commentaries of by Sarkar on Sarkar's

Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis,* (at p. 1896).

The learned authors had the following to say on the burden of proof:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

The above extract found the reasoning of Lord Denning, L J, in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372, and was cited with approval in the decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported). The highest court, quoted the following passage:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable*

to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case."

In this case it was the duty of the plaintiff to first establish that he was the owner of the land in question before proving that the defendants trespassed. As earlier on pointed out, the 17th defendant, said the land he is occupying is from plot No.1590, which is located at the hill, that fact was not disputed by the plaintiff.

It is trite law that, allegations which are not disputed are deemed to be established and proved. Therefore the fact that the land occupied by the 17th defendant is part of plot No. 1590 has been established and proved. That being the case, it has been established hereinbefore that plot No.1590 was not one of the plots listed in exhibit P10, which were inspected by the inspection committee and recommended to be allocated to the plaintiff. It is therefore not one of the plots for which compensation was paid. It goes without saying that, that being the state of affairs, the

plaintiff can not be taken to have established his ownership of the said plot.

Having failed to establish the condition precedent of ownership, he cannot establish that the people on the plot trespassed onto it. The third issue is therefore resolved in negative that it has not been established that, the 17th defendant is the trespasser.

In relation to the rest of the defendants, just like I held in respect of the 17th defendant, it has not been established by evidence, which plot among the listed, was trespassed into by which defendant. That being the case it becomes even harder for this court to make appropriate order as it is actually not known which defendant be ordered to vacate from where. That said, the third issue has been resolved in the negative.

Regarding the last issue which is to what reliefs are the parties entitled from the court? Having reasoned as I have done, the following are the relief that each party is entitled to.

i) The plaintiff is hereby declared the lawful owner of plots Nos. 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, and 1588, Block B Kiseke,

ii) Plots Nos. 1589, 1590, 1735, 1736, 1739, 1740, 1741, 1742, 1766, 1767, 1768, 1769, 1770, and 1771 are not the properties of the plaintiff for the reasons given here in above,

iii) Although it has been proved that the 1st defendant did not unreasonably refuse to issue the title deed to the plaintiff, it is hereby ordered that, upon application by the plaintiff and upon complying with the necessary procedures, to issue the title deed to the plaintiff in respect of all plots which the plaintiff has proved to have paid compensation.

iv) There is no proof that the 2nd to 26th defendants are trespassers to the land owned by the plaintiff.

v) The plaintiff pay costs of this suit to the defendants.

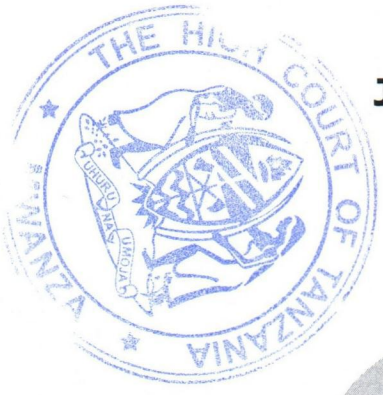
Having so found and held, I find the claim to have not been proved to the extent explained above. It is so ordered.

DATED at **MWANZA** on this 30th day of April, 2021.

J. C. TIGANGA

JUDGE

Judgment delivered in open chambers, in the presence of Mr. Innocent Ndanga learned counsel for the plaintiff Mr. Ringia for the 1st defendant and the 17th defendant through audio teleconference. Right of appeal explained and fully guaranteed.



J. C. TIGANGA

JUDGE