

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MBEYA DISTRICT REGISTRY)**

AT MBEYA

LAND CASE NO. 10 OF 2019

JASWINDER PAL SINGH.....PLAINTIFF

VERSUS

CLAVERY MAYANGO 1st DEFENDANT

ABDALLAH MPUNGA2nd DEFENDANT

NESS AMBILIKILE3rd DEFENDANT

AMANI MWAKAMBINDA@IMANI4th DEFENDANT

SAMBWEE SHITAMBALA5th DEFENDANT

JUDGEMENT

Date of last order: 15.02.2022

Date of Judgement: 27.05.2022

Ebrahim, J:

The Plaintiff, Jaswinder Pal Singh has instituted the instant case claiming against all the above named defendants jointly and severally for an exclusive ownership of Plot No. 27 with Certificate of Title No. 2593 and Plot No. 28 with Certificate of Title No. 21760 (suit lands) both located in Block BB at Uyole Industrial Area within Mbeya City. He also claims for general damages. According to the Plaintiff's averments in his plaint, he

was located the Plot No.27 with the above mentioned Certificate of Right of Occupancy way back in 1988 whereby Plot No. 27 was initially held by Kilimo-Uyole and Plot No. 28 was the property of one Elizabeth Issah Chaula which he purchased year 2012. The Plaintiff averred in the plaint further that following the fact that suit lands were in occupation before being transferred to him, the Municipal Council conducted valuation for the purpose of compensation and the amount of Tshs. 10,420,000/- was paid by the Plaintiff to the Municipal Account No. 6101200027 – NMB PLC and Exchequer No. 00652 of 21.03.2012. Thereafter, the Plaintiff secured a building permit for the sole purpose of establishing industrial structures on both suit lands but without color of right the 1st and the 2nd defendants on diverse dates between 2012 and 2013 purported to be owners of Plot no. 27 with CT No. 2593; and the 3rd, 4th and 5th defendants claimed to be owners of plot no. 28 with CT No. 21760 both located at Block BB. Uyole, Mbeya. Hence, his efforts to develop the suit land by erecting industrial structures have been tremendously sabotaged causing him an immense loss. He is praying for judgement and decree against the above mentioned defendants as follows:

- (i) *Declaratory order that the plaintiff is the lawful owner of both plots of the suit land.*

- (ii) An eviction order for evicting all the defendants from the suit land.*
- (iii) Mandatory injunctive orders permanently restraining the defendants from interfering with the Plaintiff's occupation and ownership of the suit lands for both plots No. 27 and 28.*
- (iv) Demolition order of defendant's structures illegally erected into the Plaintiff's suit land.*
- (v) An order for payment of general damages at a tune of Tshs. 500,000,000/= (Five hundred Million) or as it may be assessed by the honorable court.*
- (vi) Interest rate of 12% from the date of judgement to the date of payment.*
- (vii) Costs of the suit be borne by the defendants; and*
- (viii) Any other order/relief(s) the court may deem fit and just to grant.*

Upon being served with a copy of the plaint, as per the order of this court of 4th March 2020 (Hon. DR. Utamwa, J) the defendants filed a substituted joint written statement of defense. In their WSD, save for the contents of the paragraph that they specifically noted, they disputed all other averments and put the Plaintiff into strict proof thereof. The defendants claimed that the acquisition of the land by the plaintiff was an act of invasion, malicious, un-procedural and illegal and that the existence of deemed right of occupancy cannot be overridden. The defendants contended also that the valuation was conducted to those who were willing to be paid compensation after being threatened by the authority and the plaintiff. They also claimed that the valuation and compensation was

illegal, un-procedural and an afterthought. The defendants explained further that the 1st defendant has been using the land for 14 years after inheriting it from her mother named Mwinga Yobebe; the second defendant purchased the disputed land from one Nichorus Japhet, Enelid Japhet and Erica Lonje; and the third defendant inherited the land from Hilda Mwaisenela who purchased it from Lewinsi Timoth. As for the 4th defendant, he bought the land from one Justine Amos; and the 5th defendant purchased the property from Mawazo Mahenge Emmanuel who bought it from Mawazo Mpola all being indigenous owners. The defendants stated also that the land claimed by the plaintiff is independent of the land claimed by the Plaintiff and they also raised an issue that the land was dubiously planned to be industrial area but it was nullified by the Ministry of Land, Housing and Human Settlements Development which restored the disputed area for human settlement or residential purposes.

Initially this case was being presided over by hon. Judge Utamwa until 27.05.2021 when the case was adjourned at the cross examination stage of PW1. However, hon. DR. Utamwa, J could not proceed with the case following his transfer to Iringa Registry in June 2021. It was when I

presided over the case at the cross examination stage in terms of **Order XVIII Rule 10(1) of the Civil Procedure Code, Cap 33 RE 2019.**

When parties appeared before me, the plaintiff was represented by advocate Juliana Malunda assisted by advocate Dickson Mbilu whilst all five defendants firstly appeared in person at the plaintiff's case but later on sought the services of advocate Rose Kayombo.

After hearing of the case and visiting locus in quo, at the prayer made by the parties' counsel, the court on 8.01.2022 ordered parties to file their final submissions on or before 11.02.2022. The submissions were accordingly filed as scheduled. However, I shall not recapitulate them as they are in the record but shall refer to them in the course of addressing substantive issues.

On 25.03.2021, this court framed issues as proposed and agreed by the parties for determination as follows:

- (1) *Who is the lawful owner of the disputed land.*
- (2) *Whether or not the defendants trespassed into the suit land.*
- (3) *Whether or not the defendants, (as indigenous owners of the disputed land) were properly compensated.*
- (4) *Whether or not the right of ownership of the defendants as indigenous owners of the suit land ceased at any time.*
- (5) *Which are reliefs of the parties.*

In a bid to prove his case, the plaintiff called a total of three witnesses including himself; whilst the defendants called a total of 16 witnesses including the defendants themselves. Apart from witnesses called by the parties, the court invoked **section 176 of the Evidence Act, Cap 6 RE 2019** and called two witnesses namely Peter Msilanga **(CW1)** Senior Town Planner at Mbeya City Council; and James Matulu **(CW2)** Land Surveyor at the office of Land Commissioner Mbeya.

In determining the raised issues, I shall address the 1st, 3rd and 4th issues together as they are embodied on the issue of proof of ownership of the disputed land between the plaintiff vis-à-vis the indigenous people. The determination of the mentioned three issues shall then determine the status of the Plaintiff and the Defendants in so far as the suit land is concerned hence answers to the 2nd issue which would ultimately take us to the last issue of relief(s).

In determining this case, I shall be guided by the salutary principle in proving a civil case that "*he who alleges must prove*" as per the provisions of **section 110(1) and (2) of the Evidence Act, Cap 6 RE 2019**. The law again, i.e., **section 112 of Cap 6 RE 2019** goes further to provide to

whom does the onus of proof lies in any particular fact where there is party who wishes the court to believe the existence of the said fact.

Auspiciously, counsels for both parties agree on the principle of the law above as they have clearly defined in their final submissions. Counsel for the plaintiff in acknowledging the principle of the law under **section 110(1) and (2) of Cap 6**, found an inspiration on the holding of the Court of Appeal case of **Paulina Samson Ndawanya Vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2015 that:

"it is equally elementary that since the dispute was a civil case, the standard of proof was on balance of probabilities which simply mean the court will sustain such evidence which is more credible than the other on a particular fact to be proved".

On the other hand, counsel for the defendants in agreeing with the principle of the law in proving a civil case referred to the Court of Appeal case of **The Registered Trustees of Joy In the Harvest Vs Hamza K Sungura**, Civil Appeal No. 149 of 2017 where it was held as follows:

"Legally, if a plaintiff fails to prove his case to the required standard, the said case crumbles without having to call the defence to fight it"

Jaswinder Pal Singh (PW1) testified before the court that he was allocated Plot No.27 by Mbeya City Council in 1988 for Industrial purpose

where he was first given an offer then a Title Deed No. 2593 MBYLR which was admitted in court without objection as **exhibit P1**. He said he was informed by Mbeya City Council that the plot allocated to him, i.e., plot 27 was initially owned by Uyole Kilimo and Agricultural College and the area was later allocated to other persons as an Industrial area.

As for plot No. 28, the plaintiff testified that he purchased the same from one **Elizabeth Chaula** in 2012 and he tendered a Title Deed No. 21760 MBYLR which was admitted without objection as **exhibit P2**. He said the 1st and 2nd defendants invaded plot no. 27; and the 3rd, 4th and the 5th defendants invaded plot no 28. He testified also that before he could construct a wall he paid compensation following the valuation done by Mbeya City Council as he received a letter asking him to pay the same. He tendered a letter dated 19.10.2011, receipt dated 21.03.2012 in respect of plot no. 27 BB – attached with a matrix – showing persons to be compensated and a copy of hand written list of names, which was collectively admitted as exhibit **P.4**. He stated further that in the list there was no name of the 1st and 2nd defendants. He also tendered 13 petty cash vouchers for compensation made in respect of plot no. 28 at the sum of Tshs. 16,952,550/- which was collectively admitted as **exhibit P5**. The

plaintiff also tendered in court the official search for plot no. 27 which was admitted as **exhibit P6** and for plot no. 28 was admitted as **exhibit P7**.

In this case, the Plaintiff traces his ownership from **exhibit P1** Certificate of Title No. 2593-MBYLR in respect of Plot No. 27, Block BB, Uyole Industrial Area, Mbeya Municipality; and **exhibit P2** Certificate of Title No. 21760-MBYLR on Plot No 28, Block BB, Uyole Industrial Area, Mbeya Municipality. On the other hand, all five Defendants have different explanations on how they came about being owners of the said suit lands. In essence, the claim by the Defendants is hinged on indigenous owners as per para 7 of their substituted joint written statement of defence. At this juncture, I would say that the pertinent issue for consideration from the facts of this case is who is the lawful owner, between the Plaintiff (registered title) and defendants (indigenous owners)

Section 2 of the Land Registration Act, Cap 334 RE 2019 defines "**owner**" to mean, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered. It follows therefore that, when two persons are claiming interest over the same piece of land, it is taken that a person with certificate of title thereon, is a lawful owner. This position has been well discussed in the Court of Appeal case of

Leopold Mutembei Vs Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and the Attorney General, Civil Appeal No. 57 of 2017 quoted with approval the following excerpt from the book titled **Conveyancing and Disposition of Land in Tanzania by Dr. R.W.Tenga and Dr. S.J. Mramba, Law Africa**, Dar Es Salaam, 2017 pg 330:

*“The registration under a land titles system is more than the mere entry in a public register; **it is authentication of the ownership of, or a legal interest in, a parcel of land.** The act of registration confirms transaction that confers, affect or terminate that ownership or interest. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for **the register itself is conclusive proof of the title.**”* (Bold emphasis added).

Going by the evidence adduced in court, it is apparent that the suit land is surveyed and that the Plaintiff has a certificate of right of occupancy i.e., exhibit P1 and P2. The registration of exhibit P1 and P2 was supported by the evidence of **PW3** Registrar of Titles at Mbeya Region who testified that Plot No. 27 Block “BB” Uyole was registered on 20.03.1992 with certificate of title no 2593 – MBY LR; and Plot No. 28, Block BB Uyole was registered

on 29.03.2012 with CT No.21760 – MBYLR. He said the usage of the said plots, is for Industrial purpose. The evidence of PW3 and PW1 was again supported by the testimony of **PW2**, a land officer at Mbeya City Council who told the court that according to the records from their office, the owner of the surveyed land at Uyole area in plots no. 27 and 28 Block BB is PW1. He said PW1 was allocated Plot no 27 by the City Council in 1988 as the first owner; and as for plot no 28 he acquired by purchasing it. The first owner of the said plot no. 28 was William Bilali Chaula in 1988 and the land was passed on to one Elizabeth Isaya Chaula who sold it to PW1 in 2012. He tendered a letter from the office of Mbeya City Council addressed to the Primary Court explaining the history of the suit land and the owner which were admitted as **"exhibit page 9"** for plot no 27 and **"exhibit P10"** for plot no 28.

The 1st and 2nd defendants claim to be lawful owners of plot no. 27 **DW1** said that he was given the land by his mother one Mwinga Yobebe in 1995 who was using it for cultivation and denied to know anything about the survey and compensation. He did not know how his mother acquired the land. **DW6**, admitted that she is Mwinga Yobebe she said she gave the land to DW1 (her son) but does not remember the year. She said she was given

the land by her father and again does not remember the year. She also denied to know about compensation. DW6 did not also remember the number of "milingoti" trees planted on the said farm. DW1 also called DW 13, his older brother. He said he remembered his mother giving the land to DW1 in 1995 but does not know how DW6 acquired it. He also denied to know about compensation.

As for the 2nd defendant, **Abdallah Mpunga (DW2)**; he testified that he started leaving at the suit land in 2012 and does not know anything about plots no 27 or 28 Block BB. He bought the land from Jane for Tshs. 5,000,000/-; from Nicholaus for Tshs. 2,600,000/- and from Erica and his Sister Enerida for Tshs. 2,200,000/-. He admitted not to have any documentary evidence to prove the purchase. He admitted also that the previous owners from whom he purchased the suit land said the land is theirs legally without showing him any document.

Jane Kamaja (DW10) said she sold the land to DW2 year 2012 for Tshs. 5,000,000/-. She said the transaction was on cash basis and by mutual trust. Again, there was no document to prove the said transaction. As for how she came to own the disputed land, she said she was given the same by her mother one Anitha Kamage who was using it for farming. Equally

the same, **DW11, Nicholas Japhet** said he was given the land by his father named Japhet year 2003. He said he started using the farm year 2016 but sold the land to DW2 year 2012 for Tshs.2,600,000/=. He said by the time he was given the land, he was 8 years old and does not remember when he started using the farm. He said the agreement of Tshs 2.6m was conducted by mutual trust and they had oral agreement. The testimony of **DW12, Erica Mwaseba** was that she was given land by her father Mwaseba Lonje. She sold it to DW2 for Tshs. 2,600,000/- but does not know when she sold it to him and there was no witness during the transaction. They had an oral agreement she does not have a document to prove ownership.

As it can be deduced above, both the defendants and their witnesses relied on oral evidence and insisted that they were given the suit lands by their parents. Beginning with DW6, she does not know the year she was given the land by her father nor could she even mention the name of the said father. DW1 said the Milingoti trees were planted by her mother, who does not even remember the number of those trees. DW11, a brother only remembers that DW1 was given land in 1995. All in all, DW1 and DW11 said the land was passed to DW1 by DW6 in 1995, but DW6 does not

remember the year. As for DW2 and his witnesses, save for DW11 who said he was given the land by his father in 2003, the rest did not even testify as to when they acquired ownership of the said land. Even DW11 did not state as to when his father acquired the suit land. Again, none of the above mentioned parties had any document to prove the sale transaction nor did they call any mentioned witness to testify that they indeed witnessed the sale considering the fact that they want the court to believe on how they come about to own the disputed land as per the principle of the law laid in **section 112 of the Evidence Act, Cap 6 RE 2019** that the *onus of proof lies in any particular fact where there is party who wishes the court to believe the existence of the said fact* .

On the other hand, PW1 said he applied for plot no. 27 and was availed an offer in 1988 and later given a certificate of title on 20.03.1992. The fact that CT No 2593 – MBYLR was registered on 20.03.1992 was proved by **PW3**; and **PW2** testified that PW1 was the first owner in respect of plot No 27 after being availed the same by the City Council in 1988. PW2 also tendered **exhibit P9** as a letter that their office wrote to the Primary Court explaining the history of plot no 27.

More- so, **CW1 – Mr. Peter Msilanga, Senior Town Planner** tendered **exhibit CE1 - the Map of Town Planning at Mbeya Uyole Plots 27 and 28 with No. 23/167/181** and explained that the mapping and set usage for plots no 27 and 28 was done year 1981 and that plots No. 27 and 28 were specifically set as Industrial area since year 1981. Thus, if the Town Plan says the area is Industrial Area and anyone using those plot on different usage is against the law. **CW2 - Mr. James Matulu, a Land Surveyor from the office of** Land Commissioner Mbeya tendered a certified copy of the survey of Industrial Plots No. 1-28, 32 and P.O.S Plot No.41, Block BB Uyole Mbeya Municipality of 25.09.1990 which was admitted as exhibit **"CE2"**. Testifying further, he said **exhibit CE2** is a **Plan No. E14/472/85** and its **Registration No. is 24/260** which was approved by the Director of Survey and Mapping (upimaji na ramani) on 25.09.1990 as a final product after the survey. He added also that exhibit CE2 only shows when the map was approved and according to it plots no. 27 and 28 were surveyed for industrial usage. Further he said, exhibit CE2 is a confirmation for approval of the survey plan by the Director of Mapping between 25.09.1990 and 01.11.1991.

Counsel for the Defendants in her submission has argued that exhibit P1 shows that the CT was issued in 1988 and stamp duty paid in 1988. The map approved 1991 and certificate given in 4th December 1991. With respect to Ms. Kayombo, PW1 stated clearly that he was initially given an offer when he purchased the land. Obviously, exhibit P1 has to tell the story of all stamp duties paid from when the land was allocated and or acquired. Exhibit P1 also indicates that PW1 signed the certificate to accept terms and conditions on 4th December 1991 and finally the same was registered on 20.03.1992. Both CW1 and CW2 stated clearly that the mapping and survey were done way back from 1981 and approved by the Director of Mapping in 1990/1991. Thus, I find her argument to have no basis. That being said therefore, I find that PW1 has cogent documentary evidence to prove his ownership in respect of Plot No. 27 which goes way back to 1988 as opposed to defendants' witnesses who could not even remember or tell the court as to when the suit-land came into the hands of the purported indigenous people. As for DW 11, while he said he was given the land by his father in 2003; by then PW1 had already acquired a title over the said land. Therefore, in the circumstances of this case, I subscribe fully to the principle held in the cited case of **Leopold Mutembei (Supra)**

and hold that in the preponderance of evidence, it is clear that PW1 has cogent authentication of ownership of plot no. 27, Block BB, Uyole Industrial Area, Mbeya Municipality.

Now coming to plot no. 28, Block BB, Uyole. The 3rd, 4th and 5th defendants claim to be the lawful owners of the suit land.

DW3, Amani Mwakambinda, said he purchased the land from the previous owner called Justin Amos in 2010 for Tshs.1,400,000/=. He said Justin did not show him any document to prove his ownership. Upon being asked by the court, he said the sale agreement was lost in 2013 but did not report to the police. In support of DW3, **DW7, Mr Justin Amos Mwanawelenga**, testified that he sold the farm to Amani Mwakambinga in 2010 for Tshs. 1,400,000/= cash. He said they entered into a written agreement before the chairman. He also said that he was given the land by his grandmother namely Sister Ndolela who is still alive in 2003 but he does not have any document and did not show Amani any document.

As for **DW4, Ms. Nessi Ambilikile Ngasala**, said she purchased the land in 2009 and has been living in the land since 2010. She said she bought the suit land from Lewis Timothy for Tshs. 1,200,000/=. The purchase

was not in writing but was witnessed by the Chairman – Obedi Daudi, Ten Cell Leader – Grace Juma, Yuda and Mary John. She denied knowing about the survey or compensation. She admitted not to have been shown any document to prove ownership by the previous owner. She also said even if WSD says they know the plot, she does not. **DW9, Lewince Timothy Mpola** testified to have sold the land to DW4 in 2009 for Tshs. 1,200,000/ in cash terms. He said he was given the farm by his Aunt Siya Simwazyele year 2000. He denied knowing Elizabeth Chaula and that he was never paid compensation but admitted that his Aunt did not tell him as to where she got the said piece of land and she could not have lied to him because he has been using it without any dispute.

As for the testimonies of **DW3 and DW4**, they both could not produce any proof of the purchase of the said pieces of land. DW3 said he had a document but it was lost. He admitted to have not reported to the police. His witness DW7 said their agreement was put in writing but he does not have it. Out- rightly there is no proof of such transaction. DW3 said there was a witness named Burton, however such person was not called to prove the transaction to at least lead credence to the said written agreement. DW7 said he was given the land in 2003 by his Aunt called Sister Ndolela.

She admitted that the said Sister Ndolela is alive. Thus, since DW7 traces his ownership from her, her testimony could have proved the fact claimed by DW7 considering the fact that he does not have any document to prove the same.

As for **DW4**, she also did not have any cogent proof to prove her ownership apart from saying that she bought the suit land from Lewis Timothy for Tshs. 1,200,000/=. The purchase that was not put into writing. However, she could not call any of the people who were said witness the transaction to witness the same much as she admitted not to have been shown any document to prove ownership by the previous owner. **DW9, Lewince Timothy Mpola** testimony does not prove ownership of her Aunt Siya Simwazyele as well because he admitted that his Aunt did not tell him as to where she got the said piece of land and he only thought that was hers because she has been using it without any dispute. He denied knowing Elizabeth Chaula. Certainly that is not a plausible proof because it is obvious that he cannot prove as to when her Aunt acquired the land to at least claim indigenous ownership and have the basis of countering the claimed ownership by PW1.

I am saying so because, according to PW1's testimony, he purchased the disputed land from Elizabeth Chaula in 2012 and was availed with the Title Deed No. 21760 MBYLR-**exhibit P2**. As already explained above, PW2 testified at length that the first owner of the said plot was William Bilali Chaula in 1988; and the land was passed on to one Elizabeth Isaya Chaula who sold it to PW1 in 2012. He tendered exhibit P10 which explains the history of the suit land for plot no 28. He responded in cross examination that according to their records, William Bilal Chaula had an offer since 1988 in respect of plot no. 28.

Conversely, since the above defendants could not prove their root of ownership of their parents or Aunt from way back in 1988 where even exhibits CE1 and CE2 shows that the said suit lands were already surveyed, mapped and planned for industrial usage; **exhibit P2** is prima facie proof of ownership of the said plot no. 28, Block BB, Uyole Industrial Area, Mbeya Municipality.

DW5, Mr. Sambwe Shitambala told the court that he acquired the suit land by purchasing it from two different people. He said he purchased a semi – finished house from Mawazo Emmanuel in 2009 for Tshs. 3,500,000/-; and the open area with trees from Justine Mpola for Tshs.

1,000,000/-. He tendered the first sale agreement which was admitted as "**exhibit D1**". As for the second piece of land, he said the agreement price was Tshs. 1,080,000/- and he initially paid Tshs. 1,000,000/- by oral agreement.

In tracing the root of his ownership DW5, called one **Mawazo Jacrus Mpola** who testified as **DW8**. According to, DW8 sold the suit land to Mawazo Mahenga who sold it to him (DW5). DW8 said he sold a semi-finished house to Mawazo Mahenga in 2009 for Tshs. 2,500,000/- He said he was given the land by his aunt who is called Siya Simwazyele year 2000. Apparently, the same name of **Siya Simwazyele** has been mentioned by **DW9** as his Aunt who also gave him the land in year 2000 that he sold to **DW4 in 2009!** He tendered in court "Hati ya Mauziano" dated 05.10.2009 which was admitted as **exhibit "D2"**. He denied knowing Elizabeth Chaula. He admitted not having building permit when he built the semi-finished house. He also admitted that exhibit D2 neither reflected neighboring people, land marks or the size. He also admitted not to have any receipt for the money he received. Exhibit D2 does not reflect the size or the location of the land that DW8 sold to DW16. As such there is no proof that indeed exhibit D2 is of the same land claimed to be owned

by DW5. That notwithstanding, **Mr. Nelson Ntegile (DW14)** testified that he wrote two letters to the Director of Municipal Council, the 1st one in 2011 and 2nd one in 2012 applying for ownership, but he received the response in 2012 that the area has been allocated (owned) to another person. He testified further that he was told to be compensated by one Singh and he was indeed compensated at the Land Office and the said Singh was present during compensation. He said he started seeing DW5 at the area year 2009 and PW1 in 2012 but before 2009 the land owned by DW5 was firstly owned by Mzee Mpola who gave it to her daughter then to Mawazo. From Mawazo, the land ownership went to DW5. However, he admitted not knowing how the land was transferred from Mawazo to DW5 as he was not involved. **DW 16, Mr. Mawazo Emmanuel Mahenge,** said he sold the land with the size of 35x30 to DW5 for Tshs. 3.5million on 20.11.2009. The transaction was witnessed by Peter Lingo and Godfrey Kaponga. He said he bought the suit land from Mawazo Mpola for Tshs. 2,500,000/- and by then it had un-finished house, toilet and a kitchen. He also said that when he bought the land from Mawazo Mpola, he did not show him any document to prove ownership. Asked about his witness

when he sold the land, he said he did not have any it was only the buyer who had a witness - Peter Lingo.

Now, from DW5, DW8, DW14 and DW16s' evidence on the chronological of ownership of the suit-land it can be said that before the land passed to DW5, it was firstly owned by one Siya Simwazyele who gave it to Mawazo Jacrus Mpola (DW8) in 2000. As to when Siya Simwazyele either occupied or used the said land, it is a mystery. Nevertheless, the land was then was sold to Mawazo Emmanuel Mahenge (DW16) and the purported proof tendered was exhibit D2. I am saying it is "purported" because exhibit D2 says nothing about the size or location of the land. DW16 then sold the said land to DW5. DW5 tendered exhibit D1 to prove the said transaction. Before, I proceed to comment on testimonies of PW14, I find it apt to firstly address the authenticity of exhibit D1. One need not be an expert to see that exhibit D1 is not the same in every context from the one supplied to the court in the list of documents to be produced by defendants during the hearing filed in court on 27.05.2021 to the one tendered as exhibit in court on 09.11.2021. Firstly, the copy that was appended on the list to be relied upon states as follows: Mawazo Emanuel Mahenge "*nimemuuzia **PAGARA.....MILIONI TATU NA NUSU TU** urefu hatua za miguu 35 FT*

30...Muuzaji amelipa.....kwa maneno **MILIONI TATU NA NUSU TU**....Jina la Muuzaji **MAWAZO EMANUEL MAHENGE**... **MASHAHIDI WA MNUNUZI 1. Jina Peter .Y. Lingo**..." (emphasis is mine). Coming to the exhibit tendered in court supposing to be the original of the copy appended with the list, it reads thus: "nimemuuzia **PAGALE...MILIONI TATU LAKI TANO TU** urefu hatua za miguu 35 FT 30...Muuzaji amelipa...kwa maneno **MILIONI TATU NA NUSU TU**...Jina la Muuzaji **MAWAZO E MAHENGE**..... **MASHAHIDI WA MNUNUZI 1. Jina PETER LINGO**..." (emphasis is mine)".

DW5 admitted in cross examination that the two documents are different but serve the same purpose. That's absurd and it calls for the court clearly draw an inference that exhibit D1 is forged to reflect what DW5 wants the court to believe!!! **The law, i.e. Order X111 Rule 1(1) and (2) of the Civil Procedure Code, Cap 33 RE 2019** requires parties to produce at the first hearing all the documentary evidence of every description which they intend to rely and which has not been filed in court accompanied by an accurate list thereof.

My understanding and rationale of the above mandatory principle of the law is that in so far as the law pertaining to pleadings is concerned (**see – Order V1**), a party must append a copy of the same document that

he/she intends to submit its original/certified copy/copy during the trial as the law of Evidence would permit but not otherwise. Else, it would forfeit the whole purpose of fair adjudication of a matter by allowing parties to tender cooked or altered documents. In the circumstances therefore, I give no weight to exhibit D1 at all as I find it to a cooked document.

Furthermore, as for his other piece of the suit land claimed to have been bought for Tshs. 1,000,000/- from one Justine Mpola in oral agreement; there is no evidence from the said person to at least substantiate such transaction or tell the court as to how he acquired the suit land. All in all, DW5 failed miserably to prove ownership of the claimed land and in desperation tendered un-authentic document.

If at all, DW14 admitted to have written two letters to the Director of Municipal Council in 2011 and 2012 applying for ownership, but he received a response in 2012 that the area has been allocated to one Singh and he was compensated at the Land Office.

As for the testimony of **Mr. Godfrey Habaya, DW15** he said the misunderstanding occurred in 1990's where some people were saying that it is an industrial area. They wrote a letter applying for the land to be

changed from industrial to residential area in 2008 and they received a response in 2011 from the Director telling them that the area has been changed from industrial to residential and that by then he was the Street Chairman. However, he did not have any proof of the letter saying that the land's usage has been changed from industrial to residential. His testimony was mere words. Moreover, he said, he was a street chairman from 2008 to 2014 whilst as exhibit CE1 and CE2 show, the mapping, survey and usage was planned in early 1980's. He admitted to have been told that the land has been allocated to another person and some of the people were paid compensation and some were not. He also admitted to have witnessed the counting of crops and measuring the size of the land. He also admitted not having "Hati ya kimila" and that they were not involved when the survey was conducted in 1988. From his testimony therefore, it is obvious that he knew that the land was for industrial usage, allocated to PW1 and people were paid compensation.

Counsel for the Defendants termed exhibit P2 as fake. Her reason being the certificate of title was issued on 19th March 2012 but approved on 23rd February 2012. Again with respect, it is obvious that Counsel for the Defendants has shortcomings in reading and understanding the Certificates

of Titles or simply decides to argue misleading information. Exhibit P2 shows clearly that PW1 signed to accept terms and conditions on 23rd February 2012 and it was on 19th March 2012 when CT No. 21760- MBYLR was issued.

Moreover, the allegation of proof in registration of a title deed requires a cogent evidence to prove it and not unsubstantiated arguments. I fortify my stance with the position held by the Court of Appeal in the case of **Amina Maulid Ambali and Others Vs Ramadhani Juma**, Civil Appeal No. 35 of 2019 (Mwanza – Unreported) where it was observed as follows:

"The appellants have argued that registration in the name of the respondent was done fraudulently. This is an allegation which ought to have been proved through cogent evidence at the trial and it ought to have involved the filing of a counterclaim and joining of the relevant authority which was responsible for registration of the plot in the name of the respondent".

Needless to say, the above observation answers the issue at hands. After PW1 has produced the certificates of right of occupancy (exhibit P and P2) bearing his name, as already intimated earlier, it is prima facie proof of ownership unless the defendants had another title to complain fraud or any other form of cogent proof.

Now coming to the issue of compensation considering that land is valuable property. The land policy and the law describe the value of land and that

whoever takes someone's land must pay compensation – **section 3(1)(f) and (g) of the Land Act, Cap 113 RE 2019** which require the court to take into account that an interest in land has value and among other things a full pay, fair and prompt compensation must be taken into consideration to any person whose right of occupancy or recognised long-standing occupation or customary use of land is interfered to their detriment. In the case of **Attorney General Vs Lohay Akonaay and Joseph Lohay** [1995] TLR 80, the Court of Appeal of Tanzania in emphasising the recognition of customary land use and customary right in land held that:

"For all these reasons therefore we have been led to the conclusion that customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of art 24 of the Constitution. It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution. The prohibition of course extends to a granted right of occupancy. What is fair compensation depends on the circumstances of each case. In some cases a reallocation of land may be fair compensation. Fair compensation however is not confined to what is known in law as unexhausted improvements. Obviously where there are unexhausted improvements, the constitution as well as the ordinary land law requires fair compensation to be paid for its deprivation."

Following the above observations, it follows that the determination in relation to proof of ownership of the suit land would have assisted the court to decide whether or not the defendants were entitled to compensation.

First of all, as I have shown above on the chronological of evidence of parties from both sides, PW1 has managed to prove that indeed plots no 27 and 28 at Block BB Uyole Industrial area were surveyed and he is a lawful owner by virtue of exhibit P1 and P2. Secondly, the fact that the land was surveyed way back in 1980 and planned as an Industrial area, PW1 had no obligation to the defendants to pay them compensation. Had it been that PW1 obtained un-surveyed land, then his acquisition could have been questioned by the first owners that he would have found them in occupation of the land (indigenous).

The above notwithstanding, among the people that the defendants claimed to have obtained ownership from them but denied to know about compensation are **DW6-Mwinga Yobele**. Nevertheless, her name appears in **exhibit P4** item 6 as a person who either has been compensated or is to be compensated Tshs. 763,560/=. Again, DW7, Justine Amos appears at item 12 of **exhibit P8**. Nevertheless, payment of

compensation in this case does not validate or legalize that they owned the land. As PW2 stated in his testimony at times parties agree amicably and they could have well agreed and not come to court.

From all that I have discussed and determined above, I have already answered the first issue that the Plaintiff is the lawful owner of the disputed land. As for the fourth issue, since there was no proof of right of ownership of the disputed land by indigenous people at any time before the same passed to the Plaintiff, there was no right that could be ceased as there was none at first place. Again as to the issue of compensation, this issue collapses as well because I have already come to the findings that the defendants did not have any proved right be it customary right nor anything else. Additionally, when the land is surveyed by the responsible authority then allocated, the allocatee is not responsible for paying compensation. This position was well illustrated by the Court of Appeal of Tanzania in the case of **Linus Chengula vs Frank Nyika (administrator of the Estate of the Late Asheri Nyika**, Civil Appeal No.131 of 2018 [2020] TZCA 267 TanzLii. At page 18, the Court had this to say:

"..... At any rate, it has not been suggested that the respondent who was a mere allocatee of the disputed land was responsible for payment of compensation."

Now coming to the first issue, I answer in the affirmative that all five defendants have trespassed to the Plaintiff's land. This court visited locus in quo on 26th January 2022 and 28th January 2022 in the presence of all parties and their advocates as well as CW1 and CW2. As I said in the beginning, the visit much as it was requested mostly by the defendants but it was also to determine the extent of trespass if any. Following my observations after the conduct of GPS boundary recovery (beacon), it was discovered that all defendants have trespassed in the Plaintiffs plots whereby the 1st and 4th defendants are inside the suit-land completely. The 2nd, 3rd and 5th defendants have trespassed by a number of steps into the Plaintiff's suit land.

Therefore, the remaining issue is relief(s) sought. The Plaintiff has prayed in his testimony to be awarded general damages to the tune of Tshs. 500,000,000/-. Having answered all the above framed issues in favour of the Plaintiff, and in view of the evidence adduced in court, I consider the inconveniences caused to the Plaintiff for failure to establish industrial structure as planned and the trespassing by the defendants to his land

which hindered his timely efforts to develop the same; I award him the general damages to the tune of Tshs. 25,000,000/-. This has been substantiated by his evidence that his structures like a wall was demolished and all his development were sabotaged. I have also considered his evidence that he cooperated to pay compensation and the time loss in prosecuting this case.

As this is a civil case in nature and the standard of proof is on the balance of probabilities, it simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. A statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 340 suffice to emphasize on the point as I reproduce hereunder:

*"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 civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say - **We think it more probable than not, the burden is discharged**, but, if the probabilities are equal, it is not... "*

Applying the above principle to the instant suit, I find that the Plaintiff has managed to discharge his duty of proving his case on preponderance of evidence well within the balance of probabilities. For all purpose and intent therefore, Plaintiff's suit succeeds with the following orders being made:

- (i) The Plaintiff is hereby declared as the lawful owner of both plots on the suit land i.e., Plot No. 27, Block BB, Uyole Industrial Area, Mbeya Municipality with the Certificate of Title No. 2593-MBYLR and Plot No. 28, Block BB, Uyole Industrial Area, Mbeya Municipality with the Certificate of Title No. 21760-MBYLR.
- (ii) An eviction order is hereby granted. All defendants must evict from the suit land at their own costs within the period of three months from the date of this judgement.
- (iii) A permanent injunction is hereby issued to all the defendants and/or their agents restraining them from interfering with the Plaintiff's occupation and ownership of both suit lands i.e., Plot No 27 and Plot No 28, Block BB Uyole Industrial Area, Mbeya.
- (iv) All the defendants shall within three months from the date of this judgement demolish at their own cost all the buildings, structures, plants etc., illegally erected or placed into Plaintiff's both suit lands

i.e., Plot No 27 and Plot No 28, Block BB Uyole Industrial Area, Mbeya. The demolition shall follow the measurements to be accurately stated by the relevant authorities in case of partial trespass.

(v) All the defendants to pay the Plaintiff a total of Tshs. 25,000,000/- (say Tanzania Shillings Twenty-Five Million) only as general damages.

(vi) The defendants shall jointly and severally pay the Plaintiff's costs of this suit.

Accordingly ordered.

Mbeya
03.06.2022



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim
Judge

Date: 03.06.2022.

Coram: Hon. A.E. Temu - DR.

Plaintiff: Present.

For the Plaintiff: Maria Kalusye (Advocate)

1st Defendant: Absent.

2nd Defendant: }
3rd Defendant: } Present.

4th Defendant: Present.

5th Defendant: Present.

For the Defendants: Absent.

B/C: P. Nundwe.

Maria Kalusye: The matter is coming for Judgement and we are ready.

Court: Judgement delivered in open chamber court in the presence of both parties.


A.E. Temu

Deputy Registrar

03.06.2022


DEPUTY REGISTRAR
HIGH COURT OF BOTSWANA