

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

LAND CASE NO. 3 OF 2018

1. SYLIVESTER KULAGALIWA..... 2. JOHN MALILIKA..... 3. PAULINA CHARLES..... 4. ELIZABETH CHARLES..... 5. JUMANNE NKWABI..... 6. JULIUS MAKUNGWI.....	}	PLAINTIFFS
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VERSUS

1. KAHAMA TOWN COUNCEL..... 2. TANZANIA REVENUE AUTHORITY 3. PREVENTION AND COMBATING OF CORRUPTION BUREAU 4. DISTRICT IMMIGRATION OFFICER KAHAMA 5. ATTORNEY GENERAL..... 6. THE REGISTERED TRUSTEES OF THE RED CROS SOCIETYTY	}	...DEFANDANTS
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JUDGMENT

13th May, & 25th July, 2022

MKWIZU, J:

The plaintiff's suit against the defendants is for payment of fair and full compensation in respect of their plots of land located at Igomelo, Malunga ward, Kahama Township also known as Igomelo neighbourhood, along Boma road, covering 12.5 acres allegedly owned customarily by the plaintiffs. It is averred in the plaint that in 2017, plaintiffs learned that 1st defendant had allocated their respective land to the 2nd 3rd, 4th, and 6th defendant without their involvement. And this was after the process of

collecting building materials by the 2nd 3rd, 4th and 6th defendant had begun. That they were later in the same year summoned by the Director Kahama Council who told them to stop using the land for it is public land reserved for public offices and their request for compensation was rejected. It is on that basis that they inter alia claim for a total sum of Tshs. 200,000,000/= /= as reasonable compensation in respect of their land; 300,000,000/= General damages for psychological agony they have suffered, loss of earning, exemplary damages, plus the costs of the suit.

The first to 5th defendants filed a joint written statement of defence denying all the claims in the plaint. While admitting the fact that 1st defendant had allocated the suit land to the 2nd, 3rd, 4th, and 6th defendants. They opposed the plaintiff's claim stating that there was no customary ownership by the plaintiff that existed during the survey and demarcation of the suit land in 1998 and that the survey was done on bare land full of stones without any improvement subject to compensation. The 6th defendant also denied the plaintiff's claim claiming that the plaint has failed to show the cause of action against the 6th defendant.

On 2 /5/2022 and before the commencement of the trial the following issues were framed for determination:

- 1. Whether the suit land was customarily owned by the plaintiffs.*
If this issue is answered in the affirmative,
- 2. Whether or not the plaintiffs are entitled to any compensation*

3. Whether or not the plaintiffs had knowledge of the allocation of their land by the first defendant before 2017.

4. To what relief are the parties entitled?

All six plaintiffs gave their evidence in court in support of their claim without an additional witness. And defendant's case had a total of three witnesses. When the matter came for hearing on 11th May 2022, Plaintiffs had the services of Mr. Baraka Makowe learned advocate; 1st to 5th defendants were represented by Mr. Georgy Kalenda and Musa Mpogole all learned State Attorneys and Mr. Robert January Kayoka chairperson Red Cross Shinyanga appeared on behalf of the 6th defendant.

The first witness, Paulina Lukas, a resident of Korogwe street, Malunga Village in Kahama District testified that her deceased husband owned one acre of land at Igomelo during the Late Mwalimu Nyerere regime in 1961 acquired by clearing a virgin land in the year she doesn't remember after they had shifted to Kahama from Tabora. She said she used the land for growing maize, ground nuts, and beans. She learned of the invasion by the defendants in the year 2017 when the defendants brought on the suit land building materials. She was, together with Malilika Kulagalilwa, Charkes Julius Makungwi, and Julius Nkwabi summoned by the Director-Kahama Town council telling them to stop using the suit land for it was demarcated for public use. This witness informed the court that, she had to shift her farming activities to Kitwana Village a far distance from her residence thus incurring unnecessary costs for food production. She on that basis claimed a 20,000,000/= compensation against the 1st defendant.

PW2 is Elizabeth Charles, again a resident of Malunga Kahama. She informed the court that her father Charles Manyanda (the deceased) was owning a one-acre land at Igomelo near the District Commissioners' offices. She like PW1 used the suit land for farming activities growing maize, groundnuts, and beans. She said, in 2017 she found Mr. Kayoka – a Red Cross officer bringing in building materials on her farm, and on inquiry, she was advised to see the Director Kahama Town Council for clarification. PW2 told the court that, they consulted the Director who ordered them to stop using the suit land as was allocated to the Government department. She obeyed the order and reallocated her farming activities to Ngaya village where she now grows puddy. She claimed for 20,000,000/= compensation.

PW2 informed the court during cross-examination that, the land was given to her by her father in 1985. Testifying on the size of the land, PW2 said she was only told by her father that the land is one acre. She herself took no measurement.

The second plaintiff, John Augustino Malilika gave sworn evidence that his father acquired the land in the 1960s by clearing the bushes. They used the land for growing food crops namely maize and groundnuts until 2017 when he learned of the encroachment by the immigration officers who brought in building materials. And the alienation of his land has caused him to lose as he had to hire alternative land in a nearby village for farming which is costing him 150,000/= to 200,000/=. He prayed for compensation of 100,000,000/= stating that his land is within the Municipal Council and hence valuable.

He during cross-examination insisted that the land belongs to his father Augustino Malilika who passed away in 2009 and that he is an administrator of his father's estate under Sukuma customary law. He was however candid enough to admit that he has no paper showing that he is an administrator of his father's estate.

PW4 is one, SILVESTER KULAGALILWA, 1st plaintiff and the owner of a piece of land in the complained area measuring one acre. He according to his evidence, acquired the suit land in 1968 by clearing a virgin land and built a mud house in 1969. He added that he later used the land for growing food crops such as maize, sweet potatoes, and beans. He was 2017 orally ordered by the Township Council Director by then to stop using his land as it belongs to the government. They then organized themselves and met the Director Kahama town council by then, who confirmed to them that the land belongs to the government.

Speaking of the effect of the alienation, PW4 said, he is now forced to do farming activities in Ushirombo- Igaramaligo village at a distance of 70 kilometers from his home. He prayed for compensation of 70,000,000/= plus the costs of the suit. He completely denied knowing about the survey conducted on the suit land in 1998 and even the PT plans.

Another witness is Jumanne Nkwabi Makungwi, (PW5) one of the plaintiffs claiming a total of three acres belonging to his father- now deceased and on which the TRA has as of now constructed their office building. Like other plaintiffs, this witness is in court seeking compensation worth 100,000,000/=from the Director Kahama Municipal council. He also

during cross-examination denied having knowledge of any survey conducted on the suit land by the government officials in 1998.

PW6 is one, Julius Paulo Makungwi resident of Igomelo Malunga in Kahama district. He also claims for compensation for his parent's land measuring five acres allocated to the government institutions by the Director Kahama municipality without his involvement. The land according to this witness came to him as a chairman of the family after their parent's death. It is PW6's evidence that he learned of the encroachment in 2017 when the TRA, TARURA, and TRA wanted to extend their boundaries to their land. And that efforts to resolve the matter with the Director Kahama town council bore no fruits hence this suit. He pegged his prayer for compensation at 150,000,000/= on the ground that the land is urban land and it earned them a living. He during cross-examination denied knowledge of any survey conducted in 1998 and that his parents did not inform him of the same.

Defence case had three witnesses. DW1 is Robert January Kayoka, chairman of Red Cross Shinyanga Region. His evidence was essentially on how they acquired a plot within the suit land. He said, in 2000 Red Cross wrote a letter to the Director Kahama Township requesting a plot for constructing their offices. Their request was accepted on 20/12/2001 and they were served with a letter offer for plot No. 72 Bock LLMD Igomelo Kahama measuring 1025 square meters.

DW1 explained further that they were given empty land without any economic activities on it. He only heard of the plaintiffs complaining to the responsible minister in 2017 during his visit to Kahama but they were also

informed that the Land belongs to the government. He on behalf of the Red Cross prayed for the dismissal of the suit for lacking in merit.

DW2 is Mary Juma Mabura, an assistant Immigration officer. This witness said their office had in 2005 successfully applied for allocation of a plot from the land authorities Kahama. They were allocated a plain Plot, open space in the same year 2005. The plot is now fenced with a security house inside. The allocation was subject to payment of the offer letter and right of occupancy which they did.

Another defence witness is a land Authorised officer Kahama Municipal Council, Yusufu Lugumba. He said the suit land was reserved for government activities even before independence and planned for public use only particularly the building of the government offices. He described it as land close to the District Commissioner's office and Kahama Municipal Directors offices. Part of it is allocated to TRA, Immigration, PCCB, Red Cross, NIDA, MP offices, CWT, RUWASA, National Prosecution Service, Building department of the council, and others.

This witness testified further that, the Kahama Town Council by then had a long-term plan from which the last PT plan was developed in 1998(exhibit D1). This last TP plan shows the reserved areas of the hill encircling the District Commissioners offices, Tree Park area with the complained areas at the middle's area without inhabitants. The implementation of the plan, according to DW3 is supervised by the Municipal Council. And the institution in need of the office location applies through the Director Municipal Council. The application is channeled through different Committees of the council including the Urban Planning

and Land Committee before the result is communicated to the applicant. And that is the process that all five defendants took before the grant of their application by the Director. He tendered in the Court letter offer issued to the Red Cross, TRA, and Immigration, as exhibits D2, D3, and D4 respectively. He also tendered in court Landform No 22 with LO No. 1003731 issued to the Immigration through the Permanent Secretary, Ministry of Home affairs.

Speaking of the possibility of there being a condition for payment of compensation to the former occupiers of the suit land before it was allocated to the government institution or even acquired by the government, DW3 said there was no such possibility for the land was acquired by the government long before the coming into force of the Land Act 1999 which recognized the value of bare land. Before that, DW3 said the compensation was being paid to unexhausted improvement after the occupiers of the land are notified of the acquisition of the land for public use.

At the closure of the defence case, parties' counsels were ordered to file their Final Written Submissions and all counsels complied with the court order. To avoid unnecessary the repetition of issues, I propose to take the party's final submissions into account during the analysis of issues.

Having keenly considered the pleadings, evidence on the records as well as the party's counsel's final submissions, I should now proceed to determine the issues, the first being *whether the suit land was customarily owned by the plaintiffs*. It is trite law that he who alleges has a burden of proving his allegation as per the provisions of section 110 of the

Tanzania Evidence Act, Cap 6, R.E. 2002. And the position is, the party with the legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. Thus, the plaintiffs, in this case, bear the burden of proof.

It is the plaintiff's case that the land was owned customarily. The ownership by the plaintiffs was of two categories. The first category is the plaintiffs who claim to have themselves cleared the virgin land. This included PW1, Paulina Lukasi and PW4- Sylvester Kulagalilwa. PW1's evidence was that her husband started occupying the one-acre land during president Nyerere regime in 1961. She said, they cleaned the land at Igomelo in the year she doesn't remember and at that time they were coming from Tabora as his husband was a public servant. She used the land for growing food crops namely groundnuts, maize, and beans and the derivatization of her land forced her to hire land for farming activities from a person mentioned by one name of Charles of Kitwana village.

I have with great care evaluated this piece of evidence. The assertion of ownership lacks proof. This witness is 78 years of age and had stayed on the suit land for almost 61 years calculated from 1961 the time she claimed to have started using the land. This witness's evidence is without the description of her land for proper identification if at all she owned one. Again, the allegation of there being farming activities on the suit land was not proved as well, by either PW1 herself or by the person from whom she had hired the land for farming after the alleged allocation of her land by the 1st defendant. Under normal circumstances, Pw1 was expected to have invited as a witness even the village leaders, or even neighbours to

establish her ownership and or her use of the suit plot from 1961 to the time of the alleged illegal taking of her land.

The same applies to PW4 who alleges to have cleaned a virgin land measuring one acre at Igomelo part of the suit land in the year 1968. The evidence given by this witness is also without details and particulars of the portion of the land complained of to confirm its existence. No mention of the boundaries or neighbors. Thus, it is uncertain if 1st plaintiff owned any portion of land for purposes of establishing the compensation claimed in the amended plaint.

The second category of ownership is inheritance as testified by PW2, PW3, PW5, and PW6. These are the claimants who did not clear the virgin land. They are in court claiming their parents' land. PW2, Elizabeth Charles said, the land measuring one acre belonged to her late father Charles Manyanda who gave it to her in 1985. That her father passed away in August 2021 after suffering from memory loss and paralysis.

The credibility of this witness is questionable. She only alleged ownership without details of the suit plot she herself alleged owning. In her evidence in chief, this witness said, "***the suit land is located at Igimelo neighbour to the district offices***" and that she was informed of the size of the plot by her father. This is doubtful. The doubt is created by PW2's inability to satisfactorily describe her one-acre plot. She, as testified, has been in the use of the plot for 32 years from 1985 to 2017. This long occupation of the plot should acquaint the user, PW2 with the size of the land more accurately than anybody else. In addition to that, while admitted during cross-examination that she is the only one in their family who was given land by her father, none of the family members was

invited to prove the truthfulness of this assertion. On top of that, this witnesses' evidence is lacking clarification on how, and when the late Charles Manyanda got the suit land is not explained. The 4th plaintiff here was duty bound to prove her title over the suit land. Unfortunately, the Court cannot rely on her mere words.

Another plaintiff is PW3 John Augustino. This witness claims for his father's land was acquired by clearing the bush in the 1960s. His testimonies classify him as an administrator of his father's states. While admitting to having no papers exhibiting that he is legally an administrator of his father's estate, PW3 said the estate is being administered customarily under Sukuma Customs and that even the village authority is aware.

Before discussing the raised issue of customary administration of the deceased's estate which I propose to determine later, I should perhaps briefly state here that, the third plaintiff's land is not described by either location or boundary. Even the size was mentioned during cross-examination on which he mentioned it as one acre. This raises doubt on the existence of any piece of land belonging to the PW3's father as alleged.

On their part, the Fifth and sixth plaintiffs, Jumanne Nkwabi Makungwi and Julius Paulo Makungwi claim four and five acres of land respectively belonging to their deceased fathers. They are neither administrators nor legally bequeathed the suit land from their parents. PW5 claims to have been using the land after the death of his father, PW6 says he is claiming the land as the chairman of the family. Two issues are discernible from

their evidence. One is the variance between the evidence and the pleadings, and two is the manner in which the 3rd, 5th, and 6th plaintiffs approached their claim.

It is a cardinal principle that parties are bound by their own pleadings, and that a party is restricted to establish the claims in the pleadings and not otherwise. The Court of Appeal in **Makori Wassaga Versus Joshua Mwaikambo & Another** [1987] TLR 88, held:-

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved evidence in evidence; hence he is not allowed to set up a new case"

Likewise, in **Astepro Investment Co. Ltd v. Jawinga Investment Limited**, Civil Appeal No. 8 of 2015 (unreported) the Court observed:

"...parties are bound by their own pleadings...the function of the pleading is to give notice of the case which is to be met. A party must, therefore, so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matter in dispute."

The amended plaint has positioned the 3rd, 5th, and 6th plaintiffs as the legal owner of the suit land. There is no description of there being a legal administrator. This is particularly stressed in paragraphs 12 and 16 of the amended plaints presented for filing in court on 22 /7/2020. The

three plaintiffs, 3rd, 5th, and 6th, however, changed their position during trial now aligning themselves as administrators and/ or beneficiaries of the suit land without prior notice to the opposite party or even the court. I think diversion from their own case is unacceptable. It exhibits their glowing failure to prove their asserted claim in the plaint. They, in their evidence tried to create another claim at the same time trying to prove it contrary to the rules of the adversarial system which requires parties to stick to their claims presented in pleadings.

Even assuming that their evidence is worth it, still, the 3rd, 5th, and 6th plaintiffs' claims would not have found their success doors. It is common knowledge that all deceased estates are legally regulated in our country be it customarily owned or otherwise. There is no instinctive heirloom of the deceased property in Tanzania. Since these three plaintiffs, (3,5, and 6) claim customary ownership through inheritance then, they ought to have established the nature and scope of the applicable customary rules, their binding, and authoritative character, and adduce evidence of the acquisition of the property in question in accordance with those rules. Neither of them was able to demonstrate the customary title and the manner of acquisition apart from just asserting inheritance. It is certainly therefore that, their evidence before this court defeats their own claim.

I have as well considered the defendant's evidence paraded by three witnesses. It is evident that the area subject of the dispute is reserved land by the government. It was dedicated, planned, and surveyed. This was demonstrated by the TP plan of 1998 (exhibit P1). This fact was expressly supported by the plaintiffs through paragraphs 8 and 9 of their amended plaint which I propose to replicate for convenience:

7. The 1st defendant in her capacity as allocating and planning authority for land matters in Kahama Township did conduct a survey in Igomelo Area in 1998, and a TP drawing was made out.

9. That is the TP drawing. The 1st defendant purportedly allocated respective pieces of land to the 2nd, 3^d, 4th, 5th, and 6th defendants disregarding the totality that the land belongs to the plaintiffs customarily and that they all along developed it. A copy of the TP drawing extracted on 7/11/2016 is attached as SK1 forming part of this pleading.

The learned State Attorney's final submissions suggest failure by the plaintiffs to state why they kept quiet from the survey of the suit land in 1998 resurfacing with the compensation claim in 2018, almost 20 years later. Bizarrely, during the trial, all the plaintiffs disowned their own pleadings. They denied knowledge of the said TP drawing plan and the survey. In his evidence, for instance, PW2 said she was not aware of the survey and the 1998 PT Plan because she was sick between 1996 to 2016. She did not however tell the court how the plot was managed in that period, whether it was left with a caretaker who might have been aware of the survey or whether the land was left without anyone to take care of it.

Denying knowledge of the survey and existence of the 1998 PT Plan, PW3 during cross-examination said, his late father was in 1998 still alive without more. But the information whether his father knew of the survey or not was left undisclosed. And testifying on the survey and 1998 PT

Plan, and contrary to what is displayed in the amended plaint, during cross-examination PW4, said:

*"In 1998 I was at Malunga. I was visiting the suit land regularly. I don't know about the survey or PT Plan. **I knew about the PT Plan of the suit land after I had filed the suit in Court**" (bold is mine).*

Had it been true that the knowledge of the survey came to the plaintiff after they had filed the suit, then there could have been no details of the same in their pleadings. PW4's evidence is concocted evidence worth ignoring.

Likewise, PW5's evidence on this point is doubtful. While in his evidence in chief stated to have been on the suit land in 2017 visiting the Kahama Director for clarification on the alienation of their land with his fellow plaintiffs, PW5 later during cross-examination changed his story claiming to have no knowledge of the survey on the suit land as he left to Singida between 2016 to 2018. This contradiction is not minor. It goes to the root of the matter for it corrodes the credibility of the witness rendering his entire evidence worthless.

In his written submissions, the plaintiff's counsel insisted on the plaintiff's claim that they are the lawful owners of the suit land. He blamed the defendants for failure to tender documentary evidence proving the alleged acquisition of the suit land before independency. He was in a way suggesting that the defendants' case is weak. I should as an emphasis restate here that, in a civil case, the duty to prove the claim lies on that person who would fail if no evidence at all were given on either side

(section 111 of the Evidence Act, [Cap 6 R. E. 2019]. That burden can only shift when the bearer of the burden discharges it to the fullest. This was said in the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) where Court of Appeal quoted with approval part of the text at page 1896 of Sarkar's Law of Evidence, 18th Edition, M.C. Sarkar, S. C. Sakar and P. C. Sarkar published by Nexis Lexis saying:

*"...the **burden of proving a fact rest 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 weaknesses of the other party...**".(emphasis added).*

And in **Anthon M. Masanga V Penina (Mama Mgesi) and Another**, Civil Appeal No 118 of 2014(unreported), the Court quoting the case of **Re B [2008] UKHL 35**, Lord Hoffman in defining the term balance of probabilities stated that:-

*"If a legal rule requires a fact to be proved (a 'fact in issue), **a judge or jury must decide whether or not it happened**. There is no room for a finding that it might have happened. The law operates a binary system in which the only **values are 0 and 1**. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule*

*that one party or the other carries the burden of proof. **If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.*** (Emphasis added)

My evaluation of evidence finds a score of 0 on the plaintiff's side bringing it to an automatic conclusion that, the plaintiffs have failed to discharge their duty. Thus, the matters end there. The burden would have shifted to the defendants if the plaintiffs had discharged their duty to the required standard. The defendant's duty to prove how they acquired the land is of no value without proof of ownership of the suit land by the plaintiffs.

The first issue is therefore answered in negative and automatically this marks the end of the matters as determination of the other issues was only subject to the confirmation of the first issue.

Consequently, the suit is dismissed for lacking in merit with costs. It is so ordered. Order accordingly.

DATED at **SHINYANGA** this 25th day of July 2022.




E.Y. Mkwizu
Judge
25/7/2022

COURT: Right of appeal explained


E.Y. MKWIZU
JUDGE