

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND CASE NO. 22 OF 2021

OBADIA ERNEST RUSHISHIKALA..... 1ST PLAINTIFF

IDD JUMA MZEE.....2ND PLAINTIFF

VERSUS

KASULU TOWN COUNCIL.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

15/7/2022 & 27/7/2022

MANYANDA, J

1. Introduction

In this Land Case, the Plaintiffs Obadia Ernest Rushishikala and Idd Juma Mzee, natural persons residents of Kasulu Town are suing the Defendants namely Kasulu Town Council and the Honourable Attorney General jointly and severally for declaration that the duo are lawful owners of the suit land. A declaration that the defendants are trespassers on the suit land, in alternative the defendants pay the plaintiffs compensation at the



market value of the suit land; and Tshs 5,000,000/= been value of trees planted on the suit land.

The suit land is located at Jitegemee street, Mwilamvya Ward within Kasulu Town Council comprising of Plots No. 1649, 1648, 1647, 1646, 1645, 1643, 1642, 1641 and 1640 all valued at estimated Tshs 40 million.

2. Background

Briefly the plaintiffs averred in the plaint that the 1st plaintiff inherited the suit land from his father and owned it for about 30 years and conserved it by planting trees and sold part of it to the 2nd plaintiff in 2015. That in 2021 the 1st defendant unlawfully encroached the suit land and erected a dispensary thereon. The defendants averred in their joint Written Statement of Defence denied the allegations of unlawfully encroaching the suit land but the same was village land donated to them for dispensary construction and it was undeveloped.

3. Representation

At the hearing of the case, the plaintiffs were represented by Mr. Eliutha Kiviyiro, learned Advocate. The Defendants enjoyed the representation services of Messrs Arnold Simeo and Edwin Rwekaza, State Attorneys.

4. Issues

This Court framed three issues after parties agreeing as follows;-

- i. Whether the plaintiffs are lawful owners of the suit property;*
- ii. Whether 1st Defendant unlawfully trespassed into the suit property;
and*
- iii. What relief (s) are parties entitled to*

5. Summary of the Plaintiff's evidence

To prove their case, the Plaintiffs adduced evidence through a total number of four witnesses namely Obadia Ernest Rushishikala (PW1), Idd Juma Mzee (PW2), John Gomegwa Kyagilo (PW3) and Isaac Ntulama Kudida (PW4).

PW1 testified that he is a lawful owner of the suit property because he inherited it from his father in 1996 after his death. Further that his father was born in 1930 on the same land. That he used the land for making bricks, he had planted trees and nursed natural ones growing on the suit property. He also testified that he built a fence wall around the suit property.

PW1 testified further that in 2015 he applied for survey and registration of the suit land but the same could not materialize because the form he filled was not yet worked on by the Town Planning office.

Further to that, PW1 testified that the suit land was sketched in a town planning map and the same bore five (5) plots No. 1645 to 1649 Block R. In 2021 the Kasulu Town Council invaded into his land and constructed a dispensary which now is complete and operative. He estimated the properties destroyed at the suit land to be Tshs 5,000,000/=. He prayed the 1st Defendant to value and compensate him.

On cross examination PW1 insisted that although he was 14 years old, he inherited the suit land because he is the only baby boy to his parents.

The second witness was PW2 who testified that he bought a piece of land which forms part of the suit property for Tshs 1,500,000/=.

When the suit land was surveyed his land bore a plot No. 1640. That he kept on using the plots and dispute arose in 2021 when the Kasulu Town Council invaded in the suit property and constructed a dispensary which now is complete and operative.

In cross examination PW2 stated that their sale agreement was reduced into writing but did not tender the Sale Agreement. Further that there are graves of the 1st plaintiffs elders at the suit property.

The third witness PW3 testified that he saw the 1st plaintiff's father occupying the suit property in 1983 before he went to Dar es Salaam. That he even bought a piece of land from the 1st plaintiff's Late father Ernest Rushishikala on which he lives now after returning from Dar es

salaam. Further, that in 2021 their village Council proposed to construct a dispensary on the suit land which was occupied by PW1 and PW2. That no compensation was paid because the suit property was treated as government land because villagers voluntarily donated their land for public use including construction of a dispensary.

He stated that since the plaintiffs did not accept to donate free their land, let them be paid compensation.

The forth witness PW4 testified that he knew the 1st plaintiffs' father, Late Ernest Rushishikala as owner of the suit property and that the 1st plaintiff inherited the same after his father's death. Further that there were planted trees such as banana plants, calyptus trees and other natural trees. In 2021 he saw a dispensary been constructed as resident of the village, like others he was involved in the plan to construct the said dispensary.

6. Summary of the Defendants' evidence

The defence also led evidence through four (4) witnesses namely Haruan Rugaziamba Nkolonigwa (DW1) Ibrahim Shikuzi (DW2), Suzan Cosmas Bwuba (DW3) and Martin Mathias Maneno (DW4).

DW1 testified that she has been living at Mwilamvya in Kasulu Township since 1973. That in 1997 Land Officer surveyed the land in Mwilamvya village whereas some plots were allocated to owners of land and some



plots were left for public use by the Government such as cemetery, market and other public buildings including dispensary. Further that villagers donated some of their plots to be open spaces for future public use. PW4 as not aware of any person claiming ownership of the land in dispute. He knew the 1st Plaintiffs father that the lived on a different area from the suit property.

In cross examination PW4 stated that residents in Mwilamvya owned land customarily without any documentation. That initially the suit property had no trees but later on he saw plants planted threat, he didn't know the owner because he resided far from it in Kasulu Township.

DW2 was Ibrahim Shikuzi he testified that he has been living at Mwilamvya area since 1974. Further that in 1997 their land was surveyed by land officers where buildings were rearranged to occupy demarcated plots.

Some plots were left as open space for market, cemetery and government public buildings

DW2 was a Chairman of the dispensary construction Committee, that dispute only occurred at the suit land as the 1st plaintiff complained that the dispensary was built on part of his father's land which he inherited

It was the testimony of DW2 testimony that part of the 1st plaintiffs land was demarcated as open space and that owners of land that was

demarcated as open spaces were reallocated other plots including the 1st plaintiffs' father, Late Ernest Rushishikala.

DW2 testified further that there were planted trees and natural trees at the suit land when dispensary construction started. That now the dispensary is in use by the public.

In cross examination DW2 stated that there was no monetary compensations and no land owners whose lands were made open space were given new alternative land. That Late Ernest Rushishikala, the 1st plaintiffs father's land was big hence part of it was demarcated as an open space for future public use.

DW3, testified that she has been living at Mwilamvya area since 1967 when was born.

In 1997 after surveying land owners were rearranged in order to get open space. There was no compensation. Such open spaces includes the suit land was unoccupied because it was relinquished by Late Ernest Rushishikala, the 1st plaintiffs father. That the suit land was taken by the Government at that time no compensation was paid. That part of their land was also taken on which a kindergartens school was build but they didn't ask for compensation.

In cross examination DW3 stated that abstinence from claiming for compensation by one person don't bar others from claiming for

compensation. That the suit premises belonged to Late Ernest Rushishikala and that she was not sure if he relinquished it. That there were big planted trees at the suit property when construction of the dispensary.

DW4, Martin Mathias Maneno, a Land surveyor testified that he knows the suit property as an open space and that a dispute arose when construction of dispensary commenced. That before 2006 the suit land was set out as an open space, however, thereafter it was approved for public use by Kasulu Town Council. The Town plan map followed the traditional demarcations that existed before 2006.

He tendered the Town plan map as "Exhibit D1". Further DW4 testified that there was no compensation because he was told land owners were given alternative plots.

On cross examination DW4 stated that he saw trees at the suit property before construction started. That he did not know the location of alternative plots and that he was not sure whether land owners were involved in surveying because he was not in Kasulu in 2006 when Exhibit D1 was drawn.

7. Counsel's submissions

After closure of their evidence, the Counsel for both sides chose not to make final submissions, they left it to the Court to decide.



8. Standard of proof

It is a cardinal principle of law that he who alleged must prove and in Civil Case the standard of proof is that of balance of probabilities. This principle is enshrined under section 110 and 111 of the Evidence Act, [Cap.6 R.E. 2019].

Section 110 reads as follows;

"110(1) whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

(2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

Section 111 of the same law reads;

"111 the burden of proof in a suit proceeding lies on the person who would fail if no evidence at all were given on either side"

The burden of proving the facts lies upon the person who asserts. The principle is based on an ancient rule that **incumbit probation qui dicit non-qui negat**" which means the burden of proving facts rests on the party who substantially asserts the affirmation of the issue and not upon the party who desires it, for a negative is usually incapable of proof.

9. Analysis of evidence

a) First issue

I will start with the first issue that is whether the plaintiffs are lawful owners of the suit property. As seen in the evidence of PW1 is that he inherited the land from his father in 1996. He did so customarily, there is no any written document to that effect. The fact that his father namely Late Ernest Rushishikala owned the land in dispute was also given by PW3 and PW4 that they saw the 1st plaintiffs father occupying the land in dispute. This fact also is supported by DW3 the chairman of the Mwilamvya Dispensary Construction Committee that the dispensary occupies part of the land of which was occupied by Late Ernest Rushishikala, the 1st plaintiff's father.

The 1st plaintiff stated in cross examination that he was only son of Late Ernest Rushishikala, hence a heir under customary inheritance. This fact was not controverted. In these circumstances this Court finds that the land on which the dispensary is constructed was owned by the father of the 1st plaintiff and that he inherited the same after his father's death in 1996.

The evidence also is very clear that in 1997 survey was carried out which included the land of Late Ernest Rushishikala. The evidence of PW3, PW4



and DW1, DW2 and DW3 is that when survey was carried out residents were required to arraign themselves, by adjusting their buildings, in accordance with the plots. That some areas were earmarked for public use and open space. The 1st plaintiffs' evidence is that when survey was carried out the suit land was also surveyed and ten plots were produced. He unsuccessfully attempted to register. However, he sold a plot No. 1640 to the 2nd plaintiff. He erected his house which according to DW3, the same faces the dispensary.

The evidence of both the plaintiff and the defence tells that open spaces for public use in future were obtained from residents who volunteered.

DW2 for example testified that they volunteered their land on which a public kindergarten school was constructed.

From the evidence, it is clear that the land on which the dispensary is constructed belonged to the 1st plaintiff and that part of it was sold to the second plaintiff. Whether the 1st plaintiff and the second plaintiff volunteered it for that purpose is considered in the next issue. I find that the first issue is affirmatively proved.

(b) Whether the 1st Defendant unlawfully trespassed into the suit property.

Having answered the first issue in affirmative that the suit property belongs to the plaintiff the next issue is straight forward in affirmative



also. I say so because from the testimonies of the 1st and 2nd plaintiffs is that they didn't consent for the construction of the dispensary in their land without any compensation or provision of alternative plots. The defence witnesses testified that there was no alternative plots given to the affected residents whose land was taken for open space and public use such as roads, market, cemetery and public buildings. Instead it were the residents who volunteered.

DW2 at page 54 of the typed proceedings stated as follows;

"There was no monetary compensation to the land owners there were no new alternative plots, but they were told to remain with their remaining areas in their shambas. Mzee Ernest was one of those whose areas were taken and not compensated nor given alternative plots".

In re-examination this witness stated that the area of Late Ernest Rushishikala was big so that part of it was included into open space.

The testimony by DW3 is to the effect that the 1st plaintiff has other land on which he built his house facing the suit property.

That the piece of land on which the dispensary is erected was relinquished by his father, she stated as follows;

"The suit premises belonged to Late Ernest Rushishikala but the part which was included in the open space he

relinquished it. Currently Obadia is claiming the area relinquished by his father".

However, the evidence led by the 1st plaintiff which was uncontroverted is that his father died in 1996. The evidence by the defence witnesses including DW3 is that the survey was done in 1997. This Court doubts the testimony by DW3 that the suit land was relinquished by the 1st plaintiff's father while it appears from the evidence that he died before survey was conducted.

Therefore, from the analysis above, it remains a fact that the 1st plaintiff did not give up their land, the same was taken by the 1st Defendant on presumption that there was consent or compensation in a form of alternative plots, as the evidence shows some residents gave up their lands voluntarily.

However, that was not evidence that all residents consented just as DW3 stated in cross examination at page 59 of typed proceedings that;

"Non-request for compensation by one person does not bar another from claiming for the same"

The second issue is answered in affirmative;

(c) *What relief(s) are parties entitled to.*

I have already found in issue (b) that there was neither compensation nor alternative plots given to the affected residents who did not volunteer their areas to be taken. In this matter, the plaintiffs been lawful owners of the suit property and didn't volunteer to relinquish their land to the 1st Defendant, then they deserve their rights.

In the plaint, the plaintiffs prayed, apart from declaratory orders of ownership, for compensation according to the existing market value of the suit land and compensation of Tshs 5,000,000/= been value of plants destroyed at the suit property.

My understanding of this prayer is that the plaintiffs be paid compensation according to the value for the suit premises as evaluated to date. However, they didn't lead evidence to establish the said value. The plaintiffs estimated Tshs 40,000,000/= but that is not proof of the value. This Court can not configure an amount of compensation from the air. It was their duties to establish such value. On the other hand, all witnesses testified that there were both planted and tress at the suit property such as eucalyptus trees, banana plants and a wall fence.

Hence, I find that there were unexhausted improvements which deserve some compensation which I find wise to away. The amount of Tshs 5,000,000/= caters the situation.

The plaintiffs asked this Court to stop the defendants from using the dispensary which according to the evidence from both sides is in full use.

With due respect, there is no evidence or basis for issuance of such an order. Moreover, the dispensary which is in use already is serving the public including the plaintiffs themselves. It will be absurd to issue such an order.

The plaintiffs must understand that there is a special procedure for execution of decrees against the Government.

In the result I find that the plaintiffs have proved their case. Consequently, I make the following orders;

1. That the disputed area/plots belong to the plaintiffs.
2. The defendants trespassed into the plaintiff's area/plot
3. Since the suit land has already been taken and developed by the 1st Defendant The plaintiffs be paid compensation of Tanzania shillings five million only (Tshs 5,000,000/=)
4. Costs of the case to the plaintiffs by the Defendant. Order accordingly.

Dated at Kigoma this 27th day of July, 2022




MANYANDA

JUDGE