THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND CASE NO. 11 OF 2020

MABULA MBOGHISHI .....1ST PLAINTIFF

ELLY ASILIA MGOVEJI .....2ND PLAINTIFF

GASPER GEORGE MWALINGO .....3RD PLAINTIFF

STEWARD ASILIA MGOVEJI .....4TH PLAINTIFF

ASHERI MBEVA .....5TH PLAINTIFF

GEORGE KIPENDO MABEVAVA .....6TH PLAINTIFF

VERSUS

MBARALI DISTRICT COUNCIL .....1ST DEFENDANT

MABADAGA VILLAGE COUNCIL .....2ND DEFENDANT

THE ATTORNEY GENERAL .....3RD DEFENDANT

HUSSEIN MWANYAVA .....4TH DEFENDANT

AYOUB MHEPILE .....5TH DEFENDANT

JUMA MANYAVA .....6TH DEFENDANT

YUSTA ULANGA MJENGELA .....7TH DEFENDANT

JUDGMENT

Date of last order: 13th September, 2022

Date of judgment: 29th September, 2022

NGUNYALE, J.

The plaintiffs instituted this suit against the defendants claiming to be the lawful owners of unregistered land measuring a total of 14 acres

located at Mabadaga Village within Mbarali District in Mbeya Region. Each plaintiff claims to own a separate piece of land which measures two acres. They sought the following reliefs **one;** a declaration that the plaintiffs are the legal and rightful owner of the whole unregistered land estimated to fourteen acres located at Mabadaga Village within Mbarali District in Mbeya Region, **two;** permanent restrain to defendants or agents or any other person authorized by them from interfering with quite enjoyment of the land described above, **three;** for an order that the defendants pay to the plaintiffs the sum of Tsh. 30,0000,000/= as general damage, **four;** an order for the defendants to pay costs of the suit and **five;** any other remedy the court may deem fit and just to grant to the plaintiffs.

The defendants denied the claim and filed two set of defence **one,** joint Written Statement of Defence (WSD) for 1st to 3rd defendants and another joint WSD for 4th to 7th defendants. Basically, they alleged that the suit land is the property of the Mabadaga Village Council and it has never been allocated to any person. They further alleged that the suit land is a pastoralists reserve area.

The plaintiffs were represented by Luka Ngogo learned advocate whereas the defendants had the service of Joseph Tibaijuka, the learned

State Attorney. During Final Pre-Trial Conference the following issues were framed;

i. *Who is the lawful owner of the disputed suit land; and*
ii. *To what reliefs the parties are entitled to.*

To prove the case the plaintiff called nine witnesses and two exhibits PE1(sale agreement of the farm) and PE2 (notice of intention to sue). During evidence it was alleged by PW1, PW2, PW4, PW5, PW6 and PW7 that the suit land was allocated to them in 2002 after they had applied orally to the village government. After deliberation the village general meeting approve their application and each one was allocated two acres. They further averred that before being allocated the village government wanted them first to excavate the tunnel for irrigation scheme which they completed in July, 2002 and in October same year, they were allocated the suit land. They added that they have been in use of the suit land from 2002 to 2018 when the dispute arose. PW3 on his part claimed to have acquired ownership in 2019 through purchase from PW9 which was indorsed by the local government, the sale agreement Exhibit PE1 was admitted in support. PW8 stated that he served as a village chairman from 2007 to 2009, during his reign in 2007 they discussed the plan to have the pastoralist reserved area, farming area and residential areas. He added that the area declared as a pastoralist reserve is not

included in the land owned by the plaintiffs which was being used for puddy cultivation.

On part of the defendants called four witnesses and produced one exhibit DE1, minutes of village assembly meeting of 2020. In principle their evidence was that the suit land is owned by the Mabadaga village and it has been reserved for pastoralist activities. They asserted that the suit land has never been allocated to the plaintiffs and there is no records that there was any village assembly to discuss the issue of allocation.

Counsel for both parties had their oral final submission. Mr. Ngogo submitted that the plaintiffs managed to establish ownership of the suit land through oral testimony. He added that PW7 and PW8 being village leaders participated in allocating land to the plaintiffs. He discounted defence evidence of DW4 for he was not involved in allocation exercise. He was of the strong view that oral evidence on allocation superseded documentary evidence. He cited the case of **Neema Thomas Mkury (the administratis of the estate of the late Thomas Mkurya vs Gissey Chacha,** Misc. Land Appeal No. 96 of 2021, HCT at Musoma (Unreported). He added that decision of the District Commissioner was based on land officer who were even not called to court. Mr. Ngogo

rounded his submission that should the court find there was no allocation still the plaintiffs have used the suit land for 18 years without interruption.

On part of the defendants' counsel, he submitted that the plaintiffs have failed to prove the case as required by section 110 of the Evidence Act [Cap 6 R: E 2022]. To substantiate he stated that the suit land was owned by the village but there is no any proof that it was allocated to the plaintiffs after being approved by the village assembly as required by section 8(5) of the Village Land Act. He added that the plaintiffs' evidence was contradictory in that while others plaintiffs alleged, they were allocated by the social welfare committee others stated by the village council. He challenged evidence of PW8 and PW9 who were the former leaders of the 2nd defendant for their failure to tender village Assembly minutes.

On issue of continues use of the land by the plaintiffs the State Attorney submitted that adverse possession is not applicable against the government as per the land policy and common law adverse possession principles.

The above constitutes the summery of evidence and final submission from both parties.

Starting with the first issue who is the lawful owner of the disputed land the above issue is purely a question of evidence. In order to prove that the plaintiffs were allocated the suit land PW1, PW2, PW4, PW5, PW6 and PW9 lead evidence which was in common that they applied orally and were given a condition to excavate the irrigation tunnel which they did and in around October, 2002 they were allocated the land after approval by the village general meeting, each one got two acres. This piece of evidence was supported by PW8 and PW9 who during the year of 2002 worked as a village chairman and Village executive officer respectively. It has to be noted that PW1, PW2, PW4, PW5, PW6 and PW9 were not cross examined on the issue of holding village general meeting for allocating them the suit land.

On part of PW7 his evidence was to the effect that he participated in formulating the land use plan in 2007 to 2009 in which the land for farming, residential and pastoralist reserved were marked. He testified that the suit land is not part of the pastoralist reserve. When he was cross examined, he stated that the officers at the district level were not involved in preparing land use plan, they did themselves and that at that time the plaintiffs were in use of the land.

PW8 evidence was that from 2014 to date is a village chairman of Mabadaga and during his reign they never changed any land use. He testified that the suit land is used for farming and it is separated by the irrigation tunnel from the pastoralist's reserved area.

In rebuttal the DW1 and DW2 evidence was generally that when the plaintiffs were required to provide documentary proof they failed to provide one, it is when the District commissioner ordered them not to use the land. Likewise, evidence of DW3 and DW4 was that they have not found any document proving that the plaintiffs' allocation was approved by the village assembly meeting.

From the above evidence, it is trite law that he who alleges has a burden of proving his allegation as per the provisions of section 110 of the Evidence Act [Cap 6 R.E. 2022]. It is therefore the duty of the plaintiffs to prove the ownership of the suit land on a balance of probabilities.

The foundation of any suit is pleadings, while the plaintiff alleged to be allocated the suit land by the Mabadaga village through village general meeting and to have been in used from 2002 to date. In defence specifically in both two sets of WSD the defendants alleged that the suit

land has never been allocated to the plaintiffs instead it is a pastoralist reserve area through the land use plan of 2010.

I have considered the evidence of both parties, the plaintiffs' evidence that they applied to be allocated the land and were given a condition to dig irrigation trench was never contested by the defendant. In the same vein the plaintiffs' evidence that after they had completed excavating the tunnel, the village general meeting was held to allocate land to them was convened was also never tested during evidence and cross examination. In the case of **Patrick William Magubo vs Lilian Peter Kitali,** Civil Appeal No. 41 of 2019, CAT at Mwanza (Unreported) the court held that;

> *'It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth.'*

In this case it was very important to cross examine the plaintiffs and their witness on the point that the village general meeting approved their allocation of the land in dispute. It is to be noted that PW8 and PW9 were village leaders and member of village council who deliberated on application of allocating land to the plaintiffs which was approved by the village general meeting. It is a cardinal principle of the law that every witness is entitled to credence unless there is strong reason for

not believing him. PW8 stated that he was a village chairman of Mabadaga from 2014 to date and knows well the suit land which is located at Utega Hamlet being used for farming. In 2020 emerged some villagers claiming that the suit land was theirs, they resolved the issue. He added that the pastoralist area is located at the East part of the farming area and is separated by irrigation tunnel. He asserted to have participated in preparation of the land use plan which did not change the status of the suit land. PW9 stated that he was a member of the village council from 1999 to 2004 in which they deliberated the issue of allocating the suit land to the plaintiffs, and he too was allocated two acres of land which he sold to the 6th plaintiff. He testified that the pastoralist reserve area is different from the suit land.

The defendant evidence was that the suit land is a pastoralist reserve area, it was pleaded and evidence was led to that effect but upon evaluating the entire evidence the court is of the view that they did not prove that the suit land is a pastoralist reserve area. Also, the defendants annexed to their written statement of defence, the land use plan of 2010 but was never tender into evidence. Under section 115 of the Evidence Act it was upon the defendants to prove that indeed the suit land was a pastoralist serve area and not the farming land. Based on the nature of defence of the defendants after the plaintiffs had lead

evidence that the suit land is reserved for agriculture, and proved presence of irrigation tunnel which they dug, it was upon now the defendants to disapprove that the suit land is not used for farming rather a pastoralist reserve that is to say the burden of proof in this sense shifted to defendants. In the case of **Yusufu Selemani Kimaro Vs Administrator General & 2 Others,** Civil Appeal No. 266 of 2020, CAT at Dar es Salaam (Unreported) the court stated;

> *'For, in civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary. This is so because as per the case of* ***Raghramma v. Chenchamma,*** *A 1964 SC 136, such a shifting of onus is a continuous process in the evaluation of evidence.'*

From the evidence of the plaintiffs, PW8 is still a chairman of the Mabadaga Village, the second defendant in this case, he did testify on what he knows and against the government he leads. I see no any cogent reason to disbelieve his evidence for he has no any interest to serve. Similarly, as testified by other witnesses' evidence that the village general meeting was convened was forthcoming.

There is another argument that the plaintiffs did not produce any minutes of the village assembly meeting which allocated the suit land. In this judgment there is no law which requires every evidence to be

proved by documentary evidence for if that was the law most cases could collapse in pretence of none production of documentary evidence. This in *in tandem* with the best rule evidence as enshrined under section 61 and 62 of the Evidence Act [Cap. 6 R: E 2022].

Based on the standard of proof in civil suit, and so long as the plaintiffs on balance of probabilities proved that the suit land was allocated to them for the use of growing puddy, it was upon the defendant to lead evidence that the suit land is the grazing reserved area. In the circumstance of this case, the plaintiffs have proved that the suit land was allocated to them by the village general assembly in terms of section 8 (5) of the Village Land Act [Cap 114 R: E 2019]. Therefore, the first issue is answered in affirmative.

Regarding the second issue is a simple one, having decided the first issue in favour of the plaintiffs, the second issue on what remedies are parties entitled to, the plaintiffs claimed various reliefs in their plaint but evidence was led only to prove the issue of ownership that said naturally the other reliefs have not been proved.

In the upshot the plaintiffs are declared the lawful owner of the suit land each one owning a piece of land measuring two acres save for sixth plaintiff who own 3.5 acres. Based on the nature of the suit, each party to bear own costs. It's so ordered.

DATED at MBEYA this 29th day of September, 2022

D.P. NGUNYALE
JUDGE