

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND CASE NO 3 OF 2021

DAUDI MKWAYA MWITA PLAINTIFF

VERSUS

1. BUTIAMA DISTRICT COUNCIL DEFENDANT

2. BUTIAMA DISTRICT COMMISSIONER..... DEFENDANT

3. ATTORNEY GENERAL DEFENDANT

JUDGMENT

28th Oct & 13th Dec, 2022

F. H. Mahimbali, J:.

The plaintiff through this case prays for judgment and decree against the defendants for the following reliefs:

- a) The declaration that the plaintiff is the legal owner of the land in dispute.
- b) That the first and second defendants be ordered to vacate the land in dispute and the same be handed over to the plaintiff.

- c) The first and second defendants be ordered to pay TZS 350,000,000 to the plaintiff as compensation in case the 1st and 2nd Defendants are not willing to vacate the land in dispute.
- d) Costs be provided for.
- e) Any other relief that this Honourable Court deems fit and just to grant.

As to why the plaintiff claims for the above-mentioned reliefs, he has testified in this Court that the land in dispute is his as it originally belonged to his late father one **Mwita Marwa** since 1950s who acquired it through clearance of virgin land. Later in 1978 when he married, his father gave the said land to him/ inherited it.

The said land measures 29.32 acres which is located at Kyankoma Village, Nyamemange Ward in Butiama District within Mara Region. It is bordered with the road on North side, a Mountain on its south, Kiagata Secondary School on its west, Mr. Machage Nyakamoti and Nyangwe Chacha Magesa on its East side.

According to the pleadings and evidence in record, the said area is now claimed to be part of Kiagata Secondary School. Whereas, the Plaintiff

claims the said plot as his as he inherited /acquired it from his father, the defendants claim that the said area is part of the 1st Defendant and legally owned for Government School business by name of Kiagata Secondary School.

The main issues for consideration in the determination of this dispute are mainly two:

1. Who is the rightful owner of the suit land.
2. To what reliefs are the parties entitled to.

In his testimony as PW1, the plaintiff claims to own the said land from his father after being given by his father in 1978 when he got married. The said area was later invaded by Kiagata Secondary School in late 1990s and decided to sue the headmaster via Civil case No. 14 of 1997 at Kiagata Primary Court, where then the said dispute was administratively solved via the involvement of the office of District Commissioner where then the Village Authority and District Authority amicably resolved the dispute in 1999 and the case filed at Kiagata Primary Court, was then settled by being withdrawn. That despite all the settlements previously done via the office of District Commissioner in 1999 and later 2007; in

2017 the DED Butiama issued a letter ordering him to vacate the said suit land as invader. He disputed the fact that his father had given that land to the Village Government for Kiagata Secondary School as alleged. With his testimony, he tendered exhibits PE1, PE2, PE3, PE4, PE5 and PE6 to substantiate his ownership of the said land in dispute.

PW2 and PW3 supported the plaintiff's claims in one way or another. PW2 who was Divisional Secretary of the area, in his testimony, supported the claim that as Divisional Secretary of the area, he took part in the settlement of the said dispute between the plaintiff and Kyankome Village Council for an area involving Kiagata Secondary School. That in the said settlement, it was agreed that the area of the former Kiagata Middle School, be the area of Kiagata Secondary School. Thus, those boundaries had to be respected.

PW3 (Mr. Emmanuel Machage) on the other hand who is 53 years old, testified to have recognized the plaintiff as his neighbour, saying that his total area (Plaintiff's land as measuring 22.9 acres). He knows him as his neighbour since his childhood as both were born and grown up there. He got the said land by being given by his parents. And that his parents, relatives are buried there. That himself is bordered with the plaintiff on the

east side. On the West of the suit land is bordered with the Kiagata secondary School and the southern part is bordered with the mountain. The area claimed to be of Kiagata Middle School were then inherited/transformed to be of Kiagata Secondary School.

On the other hand, the defendants had two witnesses; DW1 and DW2. In his testimony, DW1 (Mr. Andrew Werema Nyakisiria -70 years old man) testified that he is the villager and resident of Kyankome Village at Kabwasi Hamlet. He is born there. That sometimes in 1997 he was one of the council members of Kyankome Village Council and that from 1999 to 2004 and 2014 to 2019, he was village chairperson of the said Kyankome Village Council. In his testimony, he stated that it was agreed in the Kyankome Village Assembly Meeting of 1986/1987 that for academic interests of their village, thirteen families had agreed to relocate to another area so that the then Kyagata Middle School, transforms to Kiagata Secondary School. Amongst the relocated families was that of Mwita Yakobo (father of the plaintiff). Others were the families of Kitoka Machango, Ibaso Mangéra, Daniel Kirato, Machage Nyakamuti, (on east side); Chambeli Matoto, Igoti Matoto, Mwita Maisori, Kibuna Mwita, Wambura Waikere, Gati Wansali (Western side), amongst them. Pupils of

Kyankome middle school were located to Kwisso, Kyagata and Nyamwirwa Primary Schools. With the family of Mwita Yakobo who is the parent of the plaintiff had been given two portions: At Serengeti and Mamititu hamlets. He testified further that, the plaintiff and his young brother Hura Mwita Yakobo were living at Moshi. That to his understanding, this saga had commenced in 1997 when the Plaintiff was employed as VEO of Kyankome village in 1994/1995 in which he used his opportunity to manipulate government information for his personal gain. That in essence, his father who was the owner of the said suit plot, had freely consented to the relocation and dully surrendered his land and relocation to another area; at Serengeti and Mamititu hamlets where he lived with his family peacefully.

DW1 added that even the multiple names of the Plaintiff (Daud Jacob, Daud Mwita Yakobo, Daudi Mwita) are fictious for purposes of concealing his personality before his employer and superiors (DED & DC). Otherwise, the plaintiff is known as Daudi Mkwaya Mwita. His father was called Mwita Jacob and his grand father one Jacob Marwa Magesa. To the best of his knowledge, the said area the plaintiff is claiming is not his but belonged to his father who voluntarily donated it to the Village for purposes of Kiagata Secondary School. He disputed the plaintiff's claims of

that land as baseless it being owned by his late father who freely donated it to the village government.

DW2 – Mr. Gilbert Ulonginagani is a land officer of Butiama District Council. His testimony is to the effect that, the said area of Kiagata Secondary School has been surveyed and its land size is 77.072 hectares. The said land is now owned by District Executive Officer of Butiama District Council for Kiagata Secondary School and has Customary Right of Occupancy Certificate with Reg. No. 416/BTM/200 dated 4th August 2018 and admitted as exhibit DE1 of the case. He testified further that the said land was legally acquired by the Village Government and those affected with the said expansion on their own voluntariness were dully compensated with equivalent land and none was dissatisfied. The plaintiff in this case has no such rights as was not one amongst the owners as per available record.

In his final submission, Mr. Ostack Mlilo learned counsel for the plaintiff bolstered that the plaintiff has established his case on balance of probability in compliance to section 3(2)b of the Tanzania Evidence Act, Cap 6, R.E 2022. Considering what the plaintiff testified, that he was given the said land in 1978 by his late father and his father had acquired the said

land as virgin in 1950s. Counting from 1950 to 1978 is 28 years, from 1978 to 2020 is 42 years. Thus, total years spent in the use of the said land by the plaintiff and his father is 70 years. For Mr. Mligo, learned advocate argued that all this time on the other hand amounts to adverse possession against the defendants. Relying on the Court of Appeal's decision in the case of **Bhoke Kitang'ita Vs. Makuru Mahemba**, Civil Appeal No. 222 of 2017, CAT at page 7&8 which held that:

"It is settled principle that a person who occupies someone's land without permission and the property owner does not exercise his right to recover it within the time prescribed by law such person (the adverse possessor) acquires ownership by adverse possession".

That in consideration of the plaintiff's case (PW1 & PW2) and exhibits P2 – p6, Mr. Mligo emphasized that the plaintiff's case on balance of probability, has been established as per provided legal standards. That his evidence is higher than of the defendants, thus he must win relying on what was held in the case of **Hemed Vs. Mohamedi Mbilu** (1986) THC 15:

"A person whose evidence is heavier than that of the other is the one who must win".

To the contrary, digesting the defense case that the plaintiff's father

donated the said land freely for Kiagata Secondary School, there is no any proof of that assertion. All this considered, Mr. Mligo is of the firm view that the plaintiff's case has been established on the balance of probability. Conversely, there is no evidence by the defendants that the plaintiff's father donated his land for Kiagata Secondary School. What was stated by DW1 has not been substantiated by any evidentiary record.

Countering the plaintiff's case, Mr. Kitia Turoke submitted in his final submission that digesting the plaintiff's case in a whole, it brings more confusion. There is a variance between the pleadings and the evidence on how the Plaintiff acquired the said land. Is it by inheritance or by grant. If it is by inheritance, then there is no proof of the same. Equally, if it is by grant, the same ought to have been established on the manner the said grant was done. No evidence on record substantiated the same. Family members were important witnesses to tell the court on the truth of the said assertions. Mr. Kitia emphasized in his submission that failure by the plaintiff to call important witnesses, it is trite law that the Court has to draw adverse inference in relation to the facts in question. As DW1 testified that the plaintiff's father had willingly donated his land to the defendant for the expansion of Kiagata Secondary School and was dully replaced with a

similar land size, the plaintiff then ought to have established by evidence that his father had not donated the said land to the first defendant for Kiagata secondary school but was given it to him by the same father. In brief, the assertion that the plaintiff was either given the said land by his father or inherited the same, his assertion does not hold water says Mr. Kitia Turoke. Where for undisclosed reasons, a party fails to call a material witness on his side, the Court is entitled to draw an adverse inference that if the witness were called, they would have given evidence contrary to his parents (See **Hemed Said V. Mohamed Mbilu** [1984] T.L.R 113.

On variance between the pleadings and the testimony, Mr. Kitia Turoke submitted, it is a cardinal principle of civil procedure founded upon prudence that parties are bound by their pleadings and that a party shall not be allowed to depart from his pleadings to change its case from what was originally pleaded. He drew support from the case of **YARA Tanzania Limited Vs. Charles Aloyce Msemwa t/a Msemwa Junior Agrovet and 2 Others**, HC Commercial Case No. 05/2013 (unreported) at page 6-7 while making reference to Nigerian case in **Mojeed Suara Yusufu Vs. Madam Idiatsu Adegote SC**. 15/2002, the Court held:

"It is now a very trite principle of law that parties are bound

by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the Court"

As the duty to prove the case basically lies with the plaintiff, it only shifts after he/she has discharged it. This was lauded in the case of **Paulina Samson Ndawavya Vs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported) where the Court of Appeal said:

"In our view, since burden of proof was on the appellant rather than the respondent, unless and until the former had discharged hers, the credibility of the respondent was irrelevant. It is thus our firm view that the appellant's criticism against the learned trial judge is with respect, without any justification"

All this notwithstanding, the defendants' counsel boasts that with DE1 exhibit, the defendants have managed to establish their case well as being owners of the said school and its land.

In digesting to the facts of the case, evidence and the applicable law, the important question here to answer is who the is the rightful owner of the suit premises. The plaintiff in his evidence claims that he was given the said land by his father as marriage gift. However, in his

pleadings he claims to have inherited it from his father. In law, these two terms have different meanings. Whereas inheritance right accrues in possessing a deceased's property upon the demise of the original owner, grant means donation of right of ownership of a property by an existing person to another during the lifetime of the original owner. In both situations, there must be evidence that the person claiming ownership by inheritance or grant has been so given.

It is true that parties are bound by their pleadings. In this case it is true that the pleadings and evidence are at variance. Whereas the pleadings say that the plaintiff inherited the said land from his father in his evidence he has stated that he has been given as a marriage gift. The decision in the case of **YARA Tanzania Limited Vs. Charles Aloyce Msemwa t/a Msemwa Junior Agrovat and 2 Others**, HC Commercial Case No. 05/2013 (unreported) at page 6-7 while making reference to Nigerian case in **Mojeed Suara Yusufu Vs. Madam Idiatu Adegote SC. 15/2002**, it was held that:

"It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be

disregarded by the Court"

Nevertheless, there is no evidence by the plaintiff that he either inherited it or was granted by his father.

In scrutiny of the evidence by PW2 actually supports the claim that there was land dispute between Kiagata Secondary School and the plaintiff and that the same ended in amicable settlement. That settlement per se, did not mean that the plaintiff established possession of the said land. By the way even the members constituting the purported Village Council had no legal mandate to make a valid decision as per law. This is because, its membership and coram is legally questionable.

There ought first to have been clear evidence that the plaintiff owned the said land legally either by inheritance or by grant as alleged. Considering the fact that the plaintiff is the son of the deceased Mwita Jacob, there are obviously family issues that went around during the grant process of the said land to the plaintiff or his inheritance. None of his relatives came to Court to say any. Thus, what the Divisional Secretary testified in Court was not establishing ownership of the said land to the Plaintiff but just establishing that at one point, the same land was involved into dispute and was amicably solved administratively. But, in any way it

was not conclusive proof that the plaintiff legally established his ownership.

Equally, the testimony by PW3 that he is neighbor to the PW1 and that he knows him since his childhood, by itself did not establish the fact that the plaintiff inherited or was granted the same by his father. The ones eligible to establish that ought to have been close relatives of the plaintiff or the deceased's relatives. None has been established.

I agree with Mr. Kitia Turoke, learned state attorney for the defendants that, in a civil suit, the primary duty of the plaintiff is to establish his claim against the defendants in the balance of probability (**Paulina Samson Ndawavya vs Theresia Thomas Madaha** (supra)). Only when that is done, then the duty shifts to the defendant to establish his claim against the plaintiff to counter the claims put. It is on balance between the two parties' claims, then the Court is invited to pronounce its judgement as who between the two parties has weightier evidence (see the case of **Hemed vs Mohamed Mbilu** – supra).

In the current case, whether the plaintiff was granted the said land by his father, there is no such evidence. Whether he inherited it, there is neither that supporting evidence. The assertion suggested by the plaintiff's counsel while quoting decision in the case of **Bhoke Kitang'ita Vs.**

Makuru Mahemba(Supra) that a person who occupies someone's land without permission and the property owner does not exercise his right to recover it within the time prescribed by law such person (the adverse possessor) acquires ownership by adverse possession cannot apply in the circumstances of the current case. This is because, the plaintiff in his pleading has not asserted so. The claim would be more relevant had the claimant been the plaintiff's father - Mwita Jacob but not the plaintiff.

To the contrary, DW1 tells much on how the Kyankome Village General Assembly between 1986/1987 agreed the Kiagata Middle School then be transformed to Kiagata Secondary School. For that transformation to take place, there ought to have been expansion of the area of Kiagata Secondary School. Amongst those who volunteered to pave way for the said expansion was Mr. Mwita Jacob. The said persons were granted equivalent land in other areas (at Serengeti and Mamititu hamlets for Mwita Jacob where he lived with his family peacefully). I have no good reasons to fault the credence of this witness considering the manner he testified in respect of this dispute (see **Goodluck Kyando vs Republic** [2006] T. L. R. 363, **Jadili Muhumbi vs Republic**, Criminal Appeal No 229 of 2021 CAT Kigoma).

All this considered and done, I am persuaded by the defense testimony and arguments that as per circumstances of this case, the plaintiff has miserably failed to establish his lawful possession of the said land in dispute against the defendants. As he failed to discharge his mandatory legal duty of establishing his possession of the said land, his purported claims then fail. In my view, since burden of proof was on the plaintiff rather than the defendant, unless and until the former had discharged his, the credibility of the defendant's case at this juncture was irrelevant. It is thus my firm view that the plaintiff has failed to establish his claims, and I hereby dismiss the suit with costs.

DATED at MUSOMA this 13th day of December, 2022.



F. H. Mahimbali
Judge

Court: Judgment delivered this 13th day of December, 2022 in the presence of the plaintiff, Mr. Kelvin, RMA and Defendants being absent.

Right of appeal is explained.

F. H. Mahimbali
Judge