

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

LAND CASE NO.2 OF 2022

AYUBU GALAKWILA MKINI..... PLAINTIFF

Vs

BONIFACE GALAKWILA MKINI.....1ST DEFENDANT

HALMASHAURI YA WILAYA YA MONDULI.....2ND DEFENDANT

ATTORNEY GENERAL3RD DEFENDANT

JUDGMENT

Date of last order:10-1-2023

Date of Judgment:16-2-2023

B.K.PHILLIP,J

The dispute between the parties in this case is over the ownership of a piece of land measuring two and a half acres, located at Migombani Village, Monduli District in Arusha Region (hereinafter to be referred to as "the disputed land"). It is the plaintiff's case that he is the lawful owner of the disputed land. He bought it from one Omary Mwinyimkuu. He invited his young brother, the 1st defendant herein, into the disputed land and allowed him to conduct farming activities therein. He did so in order to assist him (1st defendant) in taking care of his family. On the 1st January, 2021 he notified the 1st defendant to give him back the disputed land. The 1st defendant refused to do so and claimed that the disputed land belongs to him. Later on, the plaintiff learnt that a certificate of customary right of

occupancy in respect of the disputed land, with title No. 1/MON/17/04 was issued on the 9th of September 2014, in the name of the 1st defendant without his consent. In this case the plaintiff prays for the following reliefs;

- i) A declaration Order that the plaintiff is a lawful owner of the disputed land.
- ii) Eviction order and demolition of any development made by the 1st defendant or any agent or any person related to him into the disputed land.
- iii) An Order revoking the certificate of customary right of occupancy issued in favor of the 1st defendant.
- iv) General damages due to psychological torture, mental anguish, harassment caused by the 1st defendant as it shall be assessed by this Honourable Court.
- v) Interests on item (iv) herein above at the Commercial rate from the date of judgment until full payment.
- vi) Costs of this suit.
- vii) Any other relief as this Court may deem fit and equitable to grant.

The 2nd and 3rd defendants have been joined in this case as necessary parties.

In his defence the 1st defendant alleged as follows; that he was given the disputed land by the plaintiff (his brother) sometimes in 1974, unconditionally. He has developed the disputed land extensively after being in undisturbed occupation of the same from 1974 to 2021 when the plaintiff started claiming back the disputed land. A certificate of customary

right of occupancy in respect of the disputed land was issued in 2014 in his name, thus he is the rightful owner of the disputed land. The plaintiff was involved in the whole process for the registration of the disputed land in his name.

The 2nd and 3rd defendant presented a joint written statement of defence. Like the 1st defendant, they alleged that the 1st defendant is the lawful owner of the disputed land. He was given the disputed land by the plaintiff unconditionally way back in 1974. In 2014, with the assistance of the plaintiff the disputed land was registered in his name and managed to obtain a certificate of customary right of occupancy. In short, all defendants prayed for the dismissal of the plaintiff's case with costs.

During the final pre-trial conference the following issues were framed for determination by the Court;

- i) Whether the 1st defendant was an invitee to the disputed Land.
- ii) Whether the 1st defendant was given the disputed land by the plaintiff without any condition.
- iii) Whether the 1st defendant was legally bound to obtain the plaintiff's consent before registering the disputed land in his name.
- iv) Who is the rightful owner of the disputed land.
- v) What reliefs are the parties entitled to.

At the hearing of this case the learned Advocates Reginald Laswai and Duncan Oola appeared for the plaintiff and 1st defendant respectively. The learned State Attorneys Zamaradi Johanes and Mukama Musalama appeared for the 2nd and 3rd defendant.

Before embarking on the determination of the issues, I wish to point out two things which are not in dispute. One, it is a common ground that the disputed land was bought by the plaintiff from original owner namely Omary Mwinyimkuu. Two, the 1st defendant is the plaintiff's sibling.

In proving his case the plaintiff, testified as PW1 together with other three witnesses namely Jawa Ayubu Mkini (PW2), Veronica Vincent Magoyo (PW3), and Herieth Ayubu Mkini (PW4).It is worth mentioning here that PW2 is the plaintiff's son, PW3 is the 1st defendant's ex-wife, and PW4 is the plaintiff's wife.

On the other hand, the 1st defendant testified as DW1 together with Alex John Mbwambo (DW2). The 2nd and 3rd defendant called two witnesses namely ; Waziri Juma Hatibu (DW3), the Land officer for Monduli District and Grace Peter Kijazi (DW4), the Village Executive Officer of Migombani Village.

For Convenience and avoiding being repetitive, I will determine 1st and 2nd issue conjointly because they are intertwined. Both are aimed at establishing the 1st defendant's status as far as the ownership of the disputed land is concern. As alluded earlier in this judgment there is no dispute that the plaintiff is the one who bought the disputed land from the original owner. It is the plaintiff's testimony that he bought the disputed land in 1957 before the 1st defendant came to Mto wa Mbu. The 1st defendant is his young brother. Sometimes in 1974, after the death of their parents the 1st defendant had to come to Mto wa Mbu at the plaintiff's family to stay with him. By then the 1st defendant had just completed

primary School and was engaging himself in part time jobs. Later on, he was employed at Tarangire National Park. The plaintiff's testimony is supported by the testimony of PW4 as well as the 1st defendant whose testimony is to the effect that before establishing his own home he was staying at the plaintiff's home as one of the family members. The plaintiff gave him a plot of land where he built his residential house. Similarly, the testimony of PW3 proves that the 1st defendant used to stay at the plaintiff's home at Mto wa Mbu. PW3 testified that when she got married to the 1st defendant she stayed with the 1st defendant at the plaintiff's home at Mto wa Mbu and later on the 1st defendant went back to his work station at Tarangire.

Moreover, the plaintiff testified that the 1st defendant requested him for assistance in processing his marriage with Veronica Vincent Magoyo (PW3). Being the elder brother, he played a vital role in making the 1st defendant's desire to marry PW3 successful and is the one who brought PW3 to Mto wa Mbu. PW3 and the 1st defendant stayed at the plaintiff's home for a while and then 1st defendant went back to his work station at Tarangire National Park. He left his wife (PW3) at the plaintiff's home. After some time, the 1st defendant moved from Tarangire to Dar es Salaam. As days went on, the plaintiff decided to give the 1st defendant part of his land which was not far from his residence for establishing his home with his wife (Veronica) since the 1st defendant had little income. The 1st defendant managed to build a small residential on that land.

In addition to the above, the Plaintiff testified as follows; that he had to take care of the 1st defendant's wife (Veronica) who was staying at Mto

wa Mbu whereas the 1st defendant was in Dar Es Salaam at his work station. Thus, in order to manage his responsibilities smoothly, he found it prudent to allow Veronica to use the disputed land for cultivation of various crops so that she could be able to meet some of her needs. The disputed land is located at Mto wa Mbu, Migombani Village, Monduli District in Arusha Region, measuring two and a half acres. Due to the misunderstandings between the 1st defendant and Veronica, in 1978, Veronica went back to Iringa. So, the disputed land remained under the possession of the plaintiff. After some time, the 1st defendant married another woman, known as mama Hela. By that time the 1st defendant was employed by the Bank of Tanzania. He brought Mama Hela to Mto wa Mbu and requested the plaintiff to allow Mama Hela to continue using the disputed land as Veronica used to do. The plaintiff granted the 1st defendant's request aforesaid. He allowed him and his 2nd wife (Mama Hela) to continue using the disputed land for farming so as to raise money for building a better residential house at the land he gave him as well as acquire properties for his family. The plaintiff and his son namely Jawa (PW2) assisted the 1st defendant in the supervision of the agricultural activities in the disputed land. The agricultural activities were very successful and the 1st defendant managed to build a better residential house and bought other plots of land at Mto wa Mbu by the proceeds from the sales of the agricultural produce from the disputed land. In 2021, the plaintiff told the 1st defendant to give him back the disputed land but refused to do so.

Upon being cross examined, by advocate Oola and the learned State Attorneys, the plaintiff told this Court that there is no any written contract between him and the 1st defendant as far as the use/possession of the disputed land is concern. Their agreement was oral and they did not agree on the date when the 1st defendant was supposed to give back the disputed land to plaintiff. He was involved in the supervision of the farming activities which were conducted at the disputed land and was not paid any salary for doing that task. He had no intention of transferring the ownership of the disputed land into the 1st defendant. He wanted to assist him in establishing his home since he is his sibling and had no stable income. He gave him a plot of land for building his residential where he is staying up to date. He has not demanded the 1st defendant to vacate from that plot of land because he intended to transfer the ownership of the same into him.

The plaintiff's assertions are supported by the testimony of PW2 and PW4. PW4 told this Court that the 1st defendant was just allowed to use the disputed land for farming but there was no intention of transferring the ownership of the disputed land into the 1st defendant whereas PW2's testimony was to the effect that the plaintiff is his father and 1st defendant is his father's sibling. The 1st defendant was allowed by the plaintiff to cultivate the disputed land which is located at Migombani Kati area at Mtu wa Mbu, in Arusha Region, but the ownership of the disputed land remained in the plaintiff and was involved in the supervision of the farming activities which were conducted at the disputed land. He was the chief advisor and controller of all activities conducted in the disputed land.

Upon being cross examined by Advocate Oola and the learned State Attorneys, PW2 told this Court that when he was working at the disputed land he was not paid. He does not know the terms and conditions agreed upon by the 1st defendant and his father as far as the use/possession of the disputed land is concern. The proceeds obtained from the sales of agricultural produce from the disputed land were used for building the 1st defendant's residential house and buying land for the 1st defendant. His father (The plaintiff) told him that he was assisting his young brother (1st defendant).

PW3's testimony supports the plaintiff's assertions. She testified that she was married to the 1st defendant and there was a time the 1st defendant left her at the plaintiff's family at Mto wa Mbu. The plaintiff allowed her to use the disputed land for farming in order to meet her daily needs.

On the other hand, the 1st defendant's testimony is to the effect that the plaintiff being his brother gave him the disputed land out of love and affection. There was no any written agreement between them. To his understanding his brother (the Plaintiff) gave him the disputed land unconditionally. He has been in possession of the disputed land for 48 years without any interference from the plaintiff. He has developed it and registered it into his name. He tendered in Court a certificate of customary right of occupancy which was admitted as exhibit D1.

From the foregoing, it is my settled opinion that since there is no any written agreement between the plaintiff and the 1st defendant pertaining to the use/ possession/ownership of the disputed land and no any other

person was involved in their conversations /oral agreement, then this Court has to mainly rely on the plaintiff's and 1st defendant's testimony. Looking at circumstances under which the 1st defendant started using the disputed land as testified by the plaintiff and the reason which moved the plaintiff to allow the 1st defendant, and his 1st wife (veronica) to use the disputed land, I am of a settled opinion that the 1st defendant was allowed to use the disputed land by the plaintiff for farming activities in the course of assisting him in taking care of his family since, by then he had little income. The plaintiff did not intend to transfer the ownership of the disputed land into the 1st defendant as he alleged in his defence. Though the 1st defendant disputed that he left veronica at the plaintiff's home, it is the finding of this Court that PW3's testimony is credible. PW3's demeanor during the hearing was convincing and indicated that she was a truthful witness. The plaintiff's assertion that 1st defendant brought his 2nd wife to stay at the plaintiff's home and requested the plaintiff to let him and his 2nd wife to continue using the disputed land, also stands unchallenged.

In addition to the above, it is noteworthy that under the circumstances of this case where there is no any written agreement between the plaintiff and the 1st defendant which could have clearly indicated what these two brothers agreed, and in the absence of any person apart from them who can tell this Court what exactly was agreed between the two brothers, I am of a settled opinion that it is illogical to disbelieve the assertion made by the plaintiff, since he is the one who bought the disputed land and

definitely knows what he intended when he allowed the 1st defendant to use the disputed land.

I have taken into consideration the arguments raised by learned advocates and learned state Attorneys in their final submissions. I am in agreement with Mr. Laswai's stance expressed in his final submission that the 1st defendant was invited / allowed by the plaintiff to use the disputed land because he was not the owner of that land. The plaintiff is the one who allowed him to use the disputed land for farming so as to sustain his family. I am not inclined to agree with the arguments raised by Mr. Oola in his final submission that the PW3's testimony dismantled the plaintiff's case and is contradictory to the evidence adduced by the rest of the plaintiff's witnesses on the reason that she testified that the disputed land was given to her not to the 1st defendant. In her testimony PW3 told this Court that when she was staying at the plaintiff's home at Mto wa Mbu, the plaintiff who was her brother in law, gave her the disputed land for cultivation only so as to obtain her daily needs and when she left for Iringa, the disputed land remained under the possession of the plaintiff. To my understanding, what PW3 meant was that she was not given the disputed land for owning it as presented by Mr. Oola in her final submission. That is why when she left for Iringa, she did not raise any concern on the ownership of the disputed land. PW3's testimony is in line with the plaintiff's testimony in which he told this Court that after Veronica's departure, the 1st defendant brought his second wife to Mto wa Mbu and requested his second wife to be allowed by the plaintiff to use the disputed land for farming as Veronica used to do. So, what can be gathered from the evidence adduced

is that the plaintiff allowed the defendant's wives to use the disputed land because they were married to the 1st defendant. Therefore, in reality the plaintiff was assisting his young brother in taking care of his family. Mr. Oola's contention that Veronica's testimony is to the effect that the disputed land was given to her in exclusion of the 1st defendant is misconceived. In fact PW4 stated clearly that Veronica and the 1st defendant were using the disputed land together because by then they were husband and wife.

In addition to the above, I wish to point out that this is a Court of law and its decisions and /or findings have to be based on the evidence adduced not speculations. Mr. Oola's contentions expressed in his final submissions that the demeanor exhibited by the plaintiff during the hearing easily showed that there was a force behind the move taken by the plaintiff, not his mind, and even if the plaintiff will be declared the lawful owner of the disputed land he will not be able to develop it, but people around him such as PW2 are ones who can develop it are based on personal feelings and speculations not the evidence adduced. Thus, I am afraid, I cannot rely on the same in making my findings. With due respect to Mr.Oola, in my observations, the plaintiff's demeanor exhibited during the hearing do not fit in his contentions/observations expressed in his final submission. Moreover, it has to be noted that the plaintiff's capacity to develop the disputed land cannot be a basis in making the decision on who is the rightful owner of the disputed land. Also, Mr. Oola's contention that the disputed land was given to the 1st defendant by the plaintiff out of free love and affection, unconditionally, is not supported by the evidence

adduced. The main argument advanced by the 1st defendant to support his position that he was given the disputed land without any condition is that he has been in possession the disputed land for a very long time. Mr. Oola also pointed out that the 1st defendant has been cultivating the disputed land for over 48 years now and went on stating the principle of the law on adverse possession, that is , if a person has been in undisturbed occupation of another's land for more than 12 years ,he gets the ownership of the land by prescription.He cited the case of **Simon Osita Vs Admianas Seree (1988) TLR No.21**, to cement his arguments.

With due respect to Mr. Oola, the principle of the law on adverse possession cannot be applicable in this case since the 1st defendant was allowed to use the disputed land by the plaintiff. Not only that the evidence adduced has proved that the plaintiff and the 1st defendant were helping each other in supervision of the farming activities which were conducted at the disputed land. The plaintiff's and PW2's testimony on the their involvement in the supervision of the farming activities which were conducted at the disputed land when the 1st defendant was working at Dare es salaam and their assertions that they were not paid any salary stand unchallenged. The position of the law enunciated in the case of **Lengaram Meoli Vs Taiko, Misc. Land Appeal No. 44 of 2017** and **Registered Trustee of Holy Spirit Sisters Tanzania Vs January Kamili Shayo and 136 others , Civil Appeal No. 193 of 2016** (both unreported) cited by Mr. Laswai in his final submission, to wit; a claim for adverse possession cannot succeed if a person asserting the claim is in possession with the permission of the owner is relevant and applicable in

this case. In this case the evidence adduced by both sides prove that the 1st defendant was using the disputed land for farming with the permission of the owner (the plaintiff) and the plaintiff was the supervisor of the all the farming activities conducted in the disputed land. Therefore, the 1st defendant cannot claim for adverse possession of the disputed land.

Furthermore, I am not inclined to agree with the arguments raised by the learned State Attorneys in their final submissions that the plaintiff has failed to prove that the 1st defendant was supposed to return the disputed land to him. I do not need to be repetitive, suffice it to say that as alluded earlier in this judgment, in the absence of any written agreement, this court has to rely on the competing testimonies made by the plaintiff and the 1st defendant, and under the circumstances of this case, I find that the plaintiff's testimony in this issue is credible and is supported by PW3 and PW4 whose testimonies are to the effect that the 1st defendant was just allowed to use the disputed land for farming only. According to the evidence adduced by both sides at no point in time the plaintiff gave the 1st defendant the disputed land with intent of passing the ownership of the same unto him.

From the foregoing, it is the finding of this Court that the 1st defendant was not given the disputed land unconditionally, but was allowed to use the same by the plaintiff for farming in a brotherly relationship in order to assist him in taking care of his family. The plaintiff had no intention of transferring the ownership of the disputed land into the 1st defendant. I have noted that the 1st defendant after being allowed to conduct farming activities in the disputed land for a long time he ended up making a wrong

assumption that his brother (the plaintiff) decided to let him own the disputed land.

I will deal with the 3rd and 4th issue conjointly. Let me say on the onset that I am inclined to agree with the arguments raised by Mr. Laswai in his final submissions that the defendant was legally bound to obtain the plaintiff's consent before the survey of the disputed land and consequently the registration of the same in his name, for obvious reason that he was not the owner of the disputed land but a mere invitee. Therefore, it was imperative for the owner of the land to give his consent because issuance of a certificate of customary right of occupancy in the 1st defendant's name amounted to transfer of the ownership of the disputed land into the 1st defendant. As I have endeavored to elaborate in the first issue, the 1st defendant was just allowed by his brother (Plaintiff) to use the disputed land in a brotherly relationship for the purpose of assisting him in taking care of his family. There is no doubt that the evidence adduced reveals that the 1st defendant have been conducting farming activities in the disputed land and taking care of the same for a long time. However, it has to be noted that the evidence adduced also reveals that the farming activities were conducted in corroboration with the plaintiff and his son (PW2). Neither the plaintiff nor the PW2 were paid for doing the supervisory works at the disputed land. Under the circumstance, I can safely say that the farming activities conducted in the disputed land were managed jointly by the plaintiff and the 1st defendant as family activities since the 1st defendant was also regarded as the plaintiff's family member

after he had invited him to stay at his family following the demise of their parents.

In his testimony the plaintiff alleged that he did not know that the 1st defendant had registered the disputed land into his name until when he requested the 1st defendant to stop using the same and give it back to him, that is when the 1st defendant told him that he had already registered the disputed land in his name and claimed to be lawful owner of that land.

On the other hand, the 1st defendant's testimony is to the effect that he did not seek any consent for registration of the disputed land in his name since the plaintiff himself is the one who initiated the process for survey and registration of the disputed land in the 1st defendant's name. The plaintiff told him to send his photo for using it in the application for survey of the disputed land because by that time he was not at Mto wa Mbu. The plaintiff told him that he was in the process of surveying his plots of land and wanted to include the disputed land in the process. The 1st defendant sent him his passport photo as requested.

Furthermore, the 1st defendant told this Court that the plaintiff is the one who showed the surveyors the boundaries of the disputed land because by that time he was not at Mto wa Mbu. All legal procedures were observed and adhered to. Finally a certificate of customary right of occupancy in respect of the disputed land was issued in his name. He was called by Mr. Alex John (DW2) of Mto wa Mbu to collect his certificate of customary right of occupancy. The 1st defendant tendered in Court the certificate of customary right of occupancy which was admitted as Exhibit D1.

The 1st defendant's testimony was supported by the testimony of DW2 (Alex John), a resident of Migombani Village who was once a chairman of Migombani kati hamlet and Migombani Village. His testimony was to the effect that the 1st defendant and the plaintiff are his relatives. The 1st defendant is the plaintiff's sibling. He knows the disputed land. During his tenure as the village chairman of Migombani Village, he was involved in the survey of the disputed land. The plaintiff is the one who applied for the survey of the disputed land on behalf of the 1st defendant because by that time the 1st defendant was not residing at Migombani Village. The plaintiff is the one who made the follow up of the application form for survey of the disputed land because he is a close relative of the 1st defendant and is the one who gave him the disputed land. The disputed land was surveyed and finally a certificate of customary right occupancy was issued in the name of the 1st defendant. The survey of the disputed land was done in the presence of the plaintiff. He showed the boundaries of the disputed land. Apart from the suit land, the plaintiff also processed the survey of other plots of land belonging to him.

Upon being showed Exhibit D1 by leave of the Court, DW2 recognized it. He told this Court that he signed the same. Moreover, DW2 told this Court that following the plaintiff's complaint on the ownership of the disputed land and issuance of the certificate of customary right of occupancy in the name of the 1st defendant, the village council meeting was convened followed by the Village general assembly. In both meetings it was resolved that the 1st defendant is the rightful owner of the disputed land and Exhibit D1 was properly issued.

Apart from DW2, DW3 (the land officer for Monduli District) told this court that Exhibit D1 was issued before he started working at Monduli District Council, but upon receiving the plaintiff's complaint he checked his records and found out that Exhibit D1 is a genuine document and was properly recorded. The same is duly signed by the Village chairman and the Village Executive officer of Migombani Village.

Moreover, DW3 explained the procedure for application for survey of land located in a village, to wit; a person who wishes to have his/her land surveyed, has to make his application to the village executive officer ('VEO') by filling in an application form and submit the same at the VEO's office. Then, the same is tabled before the village Council meeting which is composed of 25 members. Thereafter, if the resolutions made by the village council meeting are in favour of the applicant the same are forwarded to the village general assembly. If the village general assembly indorses the resolutions made by the village council meeting, then the VEO sends those resolutions to the District Executive Director who, in return, routes the them to the land department /officers for further action which includes arranging the process for survey of the land in question and finally a certificate of customary right of occupancy is issued to the applicant.

DW4 (The VEO of Migombani Village) told this Court that upon being directed by her boss, the District Executive Director of Monduli District to ascertain whether or not Exhibit D1 was properly issued to the 1st defendant following the plaintiff's complaint, she convened the village council meeting. The resolutions made by the village council meeting were

in favour of the 1st defendant. Thereafter, she convened the village general assembly which was attended by about 300 villagers including 1st defendant who was accorded the opportunity to be heard and explained before the meeting that he was given the disputed land by his brother (the plaintiff) and has been in possession of the same for a long time.

Moreover, DW4, testified that DW2 (Mr. Alex) attended the village general assembly and was given opportunity to talk about Exhibit D1. He told the villagers that the process for the survey of the disputed land was initiated by the plaintiff himself. He applied for the survey of the disputed land on behalf of the 1st defendant who is his young brother. Finally, the village general assembly declared the 1st defendant as the rightful owner of the disputed land. DW3 tendered in Court copies of the minutes of the village council meeting and village general assembly which were admitted as exhibit D2 collectively.

From the foregoing, it is the obvious that the 1st defendant did not seek the plaintiff's consent before the registration of the disputed land. In their testimonies the 1st defendant and DW2 tried to demonstrate that the plaintiff is the one who initiated the process for the survey of the disputed land. So, to my understanding, the 1st defendant's stance is that there was no need of seeking consent from plaintiff because he is the one who initiated the process for survey of the disputed land, therefore, he impliedly consented the disputed land to be registered in the 1st defendant's name, bearing in mind that he is the one who gave the 1st defendant the disputed land. However, the plaintiff denied to have been involved in the process for the survey and registration of the disputed

land. The pertinent issue which arises here is; whether the plaintiff applied for the survey of the disputed land which resulted into the issuance of Exhibit D1. Let me make it clear that if it is proved that the plaintiff is the one who applied for the survey of the disputed land on behalf of the 1st defendant then, the 1st defendant's stance is correct, that is, there was no need of seeking the plaintiff's consent because by making an application for the survey of the disputed land on behalf of the 1st defendant, Plaintiff impliedly consented the disputed land to be registered in the 1st defendant's name and cannot be heard complaining that exhibit D1 was wrongly issued and/or illegal.

It is the position of the law that whoever desires a Court of law 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. (see section 110 of the Evidence Act). In this case I hasten to say that the 1st defendant failed to prove before this Court that the plaintiff applied for the survey of the disputed land on his behalf. Neither the 1st defendant nor his witnesses did produce in Court the application form for the survey of the disputed land which was filled in and lodged at the VEO's office by the plaintiff on behalf of the 1st defendant.

The above aside, the 1st defendant testified that the plaintiff is the one who showed the surveyors, land officers and village leaders the boundaries of the disputed land. Any query on the boundaries of the disputed land as indicated in Exhibit D1 has to be answered by the plaintiff since the survey of the disputed land was done in his presence and in the absence of the 1st defendant. But, to the contrary, DW2 testified that the survey of the

disputed land was done in the presence of the 1st defendant and he showed the boundaries of the disputed land. In my opinion there is a fatal contradiction between the 1st defendant's testimony and DW2's testimony which goes to the root of the issue on whether or not the plaintiff was involved in the process for the survey of the disputed land. In short, I find the testimony of both the 1st defendant and DW2 in respect of the issue in question not credible. I am convinced with the plaintiff's testimony that he did not apply for the survey of the disputed land on behalf of the 1st defendant and was not involved in the whole process which led to the issuance of the Exhibit D1. The plaintiff's testimony is credible.

For avoidance of doubts let me point out that I have taken into consideration the arguments raised by Mr. Oola in his final submission, to wit; that there are inconsistencies and contradictions in the evidence adduced by plaintiff and his witnesses which goes to the root of the matter, thus need to be resolved by this Court. He cited the case of **Mohamed Said Matula Vs Republic 1995 TLR 3**, to cement his arguments and contended that the plaintiff's evidence is to the effect that he allowed the 1st defendant to use the disputed land on condition that he has to return it after getting his own land. Mr. Oola's concern is that, it is not true that the 1st defendant built his residential house and bought his own land in 2021 when the plaintiff demanded him to give back the disputed land.

In addition, Mr. Oola submitted that the plaintiff admitted that he gave the 1st defendant a plot of land where he built his residential house and has never demanded the 1st defendant to return that land to him. He went on

arguing that the plaintiff gave the 1st defendant the disputed land in a similar manner and style as he did when he gave him the plot of land where he built his residential house. How come now he is demanding the disputed land to be returned to him? Moreover, Mr. Oola argued that if the disputed land belongs to the plaintiff, why then, PW2 (Jawa) when he stopped working at the disputed land handed it over to the 1st defendant not the plaintiff.

The evidence adduced reveals that the 1st defendant built his residential houses and acquired his plot of land prior to 2021. So, I agree with Mr. Oola that the 1st defendant managed to build his residential house and acquired plots of land quite a long time ago. However, in my considered opinion the fact that the 1st defendant built his residential house prior to 2021 cannot be a reason to bar the plaintiff from demanding the disputed land since there was no specific date/time agreed by the plaintiff and 1st defendant when the 1st defendant should stop using the disputed land and hand over the same to the plaintiff. Likewise, the fact the plaintiff gave the 1st defendant plot of land where he built his residential house and has not demanded same to be returned to him does not automatically mean that the 1st defendant was given the disputed land unconditionally or that the plaintiff has no right over the ownership of the disputed land. It has to be noted that it does not matter how long an invitee possesses/uses the disputed land his /her status remains the same.

In addition to the above, With due respect to Mr.Oola, I wish to point out that no evidence was adduced to the effect that when PW2 stopped working at the disputed land he handed over the same to the 1st

defendant. What can be gathered from the plaintiff's, PW2's and the 1st defendant's testimony is that, when PW2 stopped working at the disputed land the same continued to be used by the 1st defendant as it was before and the plaintiff did not stop the 1st defendant from cultivating the disputed land. There was nothing like handing over the disputed land to the 1st defendant. I have said earlier in this judgment that the way the disputed land was used and managed was regarded as a family land /farm sort of. So, the PW2 did not hand over the disputed land to the 1st defendant as argued by Mr. Oola. In short I do not see any inconsistencies and contradictions in the evidence adduced by the plaintiff and his witnesses.

I have also noted that both sides made lengthy arguments concerning the boundaries of the disputed land indicated in exhibit D1. The plaintiff's testimony is to the effect that the boundaries of the disputed land indicated in exhibit D1 are not correct, thus same is illegal. His assertion was supported by the testimonies of PW2, PW3 and PW4 who explained at length the boundaries of the disputed land and tried to show that the boundaries of the disputed land indicated in Exhibit D1 are not correct.

On the other hand, the 1st defendant's testimony on the concern on the boundaries of the disputed land was to the effect that if there is any mistake in the boundaries indicated in Exhibit D1, the same was committed by the surveyors and the plaintiff because he is the one who showed the boundaries of disputed land to the surveyors. Moreover, DW3 told this Court that if there is any mistake on the boundaries indicated in Exhibit D1, the same can be rectified. It cannot lead to the cancellation of

Exhibit D1. The same position was explained by Mr. Oola in his final submission. I am in agreement with Mr. Oola that any mistake on the boundaries indicated in exhibit D1 can be rectified. The same cannot lead to nullification of Exhibit D1. However, I do not intend to make any determination on the concern on the boundaries of the disputed land indicated in exhibit D1 because the same does not fall into the issues framed for determination in this case and do not go to gist of the controversy between the parties in this case. The concerns and arguments on the boundaries were just raised in the course of the hearing of this case but do not resolve the controversy between the parties herein. The crucial issue in this case is on the ownership of the disputed land. After all, it is true that any mistake on the boundaries of the disputed land can be rectified.

With regard to the ownership of the disputed land, in his final submission, Mr.Oola argued that the evidence adduced by the 1st defendant is supported by testimony of DW4 who tendered in Court exhibit D2 collectively (the minutes of the village council meeting and village general assembly) in proving that the 1st defendant is the rightful owner of the disputed land and the same speak for themselves. Mr.Oola was of the opinion that even if the 1st defendant would have kept quiet, the contents of exhibit D2 prove that the 1st defendant is the rightful owner of the disputed land since the same shows that the villagers who were in attendance at the village general assembly recognized the 1st defendant as the rightful owner of the disputed land. He contended that the certificate of customary right of occupancy (Exhibit D1) was issued in

compliance with law. The same position was explained by the learned State Attorneys in their final submission.

First of all, I wish to point out that the minutes tendered in Court as Exhibit D2 collectively were made following the complaint lodged by the plaintiff at the District Executive Director's office that the Exhibit D1 was not properly issued, thus it was illegal. In my settled legal opinion Exhibit D2 cannot be used as a basis for the determination on whether Exhibit D1 was issued in compliance with the law because in proving that exhibit D1 was issued in compliance with the law the 1st defendant was supposed to tender in evidence the application forms for the survey of the disputed land filed prior to the issuance of the Exhibit D1 and the minute of the village Council meeting and village general assembly held prior to the survey of the disputed land as well as a prove that the plaintiff consented the disputed land be registered in the name of the 1st defendant. No any convincing reasons were given by the 1st defendant and his witnesses for failure to produce in Court the application forms and the minutes of the village council meeting and village general assembly made prior to the issuance of Exhibit D1.

Without prejudice to my observations stated herein above, even if it was proper to rely on the contents of exhibit D2 collectively, the evidence adduced reveals that the plaintiff was not accorded the right to be heard before the village council meeting. DW4 told this Court that she only invited the 1st defendant to attend the village council meeting. She did not invite the plaintiff because the instruction from her boss (the District Executive Director) directed her to deal with the 1st defendant only. The

members of the village Council meeting had no opportunity hear from the plaintiff. Therefore, they did not hear the other side of the matter and made their decision without sufficient and balanced information from both sides. This is contrary to the fundamental right to be heard. So, the decision of the village council meeting which was tabled at the village general assembly was improper and tainted with illegality for the breach of the fundamental right to be heard. Thus, it follows that the decision made by the village general assembly was not proper since the whole process from the beginning was flouted.

It is also note worthy that the fact that the villagers at the village general assembly recognized the 1st defendant as the rightful owner of the disputed land does not alter the fact that the 1st defendant was just allowed to use the disputed land by the plaintiff who bought it from the original owner. This takes me back to the findings I made in the 1st and 2nd issue. I do not think that I need to reproduce the same here. Suffice it to say that under the circumstances of this case, the decision made by the village council meeting and village general assembly after the plaintiff had lodged his complaint that Exhibit D1 was wrongly issued, cannot confer the right of ownership of the disputed land to the 1st defendant since the 1st defendant himself admitted that he did not buy the disputed land. The crucial legal issue here is how did the 1st defendant acquire the disputed land. Being in possession of land for a long time does not automatically culminate in a right of ownership of the land in question.

Coming to the reliefs the parties are entitled to, it is the finding of this Court that the plaintiff is the lawful owner of the disputed land. The

certificate of customary right of occupancy in respect of the disputed land, with title No. 1/MON/17/04 issued on the 9th of September 2014, in the name of the 1st defendant (Exhibit D1) was wrongly issued. Thus, the same is hereby revoked. I decline to make any order for payment of general damages since I do not see any justification for granting the same. The 1st defendant shall bear the costs of this case.

Dated this 16th day of February 2023



B.K.PHILLIP

JUDGE.