

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(MOROGORO DISTRICT REGISTRY)**  
**AT MOROGORO**  
**LAND CASE NO. 07 OF 2022**

**EVODIA NGASHA** (administratrix of  
the estate of the late **Yonatas Ngasha**).....**PLAINTIFF**

**VERSUS**

**ELEONODA MAUMBA**.....**1<sup>ST</sup> DEFENDANT**

**MDINDO VILLAGE COUNCIL** .....**2<sup>ND</sup> DEFENDANT**

**DISTRICT EXECUTIVE DIRECTOR**

**ULANGA DISTRICT COUNCIL**.....**3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL** .....**4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

*Hearing date on: 03/11/2022*

*Judgement date on: 01/12/2022*

**NGWEMBE, J:**

This land case was instituted in this court on 2<sup>nd</sup> day of February, 2022 by Ms. Evodia Ngasha as an administratrix of the estate of her late father Yonatas Ngasha. That she was appointed an administratrix by Vigoi Primary Court on 25<sup>th</sup> March, 2019. Thereafter the land dispute arose involving 7.527 acres of land out of 16 acres situated at Masoko Hamlet, Mdindo Village in Msogezi Ward, Mahenge District within Morogoro region.

The plaintiff claims among others; a declaratory order that the plaintiff is the lawful owner of the suit land; that, the 1<sup>st</sup> defendant be declared as trespasser with an order to revoke her Customary Certificate of Right of Occupancy; general damages and mesne profits; and costs. According to the plaint, the cause of action against the first defendant is on trespass while the second, third and fourth are by operations of law.

Both sided have the legal services of learned advocates. While the plaintiff was represented by Mr. J. R. Kambamwene from the legal chambers of Massati & Associates, the first defendant had the services of Ms. Beatrice Gratian Madafu, and the 2<sup>nd</sup>, 3<sup>rd</sup> to 4<sup>th</sup> defendants had the representation of Messrs Xavery Ndalaha and Hemedi Said Mkomwa, learned State Attorneys from the office of Solicitor General.

This suit went through mediation as required by law, but upon failure of mediation, on 26/09/2022 parties agreed on three substantive issues for determination as follows: -

- 1) Who is the lawful owner of the suit land,
- 2) Whether the issuance of the customary right of occupancy to the 1<sup>st</sup> defendant was lawful, and
- 3) What reliefs are the disputants entitled to.

In establishing the case in line with those issues, the plaintiff presented in court five (5) witnesses, while the defence case brought forward three (3) witnesses. Commencing with the plaintiffs' case, Ms. Evodia Ngasha testified in court as PW1, that the 16 acres of farm land which includes seven acres in dispute are located at Mdindo Masoko Village in Msogezi Ward, Vigoi Division in Ulanga District, belonged to her father Yonatas Ngasha who passed away on 15/07/1995. The deceased survived




the plaintiff herself and other three children. That the deceased father planted mango trees and had erected a foundation of his house.

Proceeded that, she lives at Ulanga Mahenge, and for 19 years she had been nursing her ailing husband when her (cousin) brother Johnson Ngasha was taking care of their land, but on January 2016 she went to the farm and found the first defendant had trespassed into the land and she built a residential house therein, living and farming in her fathers' land. Upon a discussion between them, it was revealed that, her brother Johnson invited the first defendant to their land for seasonal crops cultivation only and not to own it.


Prior to instituting this suit, she was appointed an administrator of the estate of her deceased father's estate in Probate Cause No. 03 of 2019 by Vigoi Primary Court, a copy of the letters of administration was admitted as exhibit P1.

She instituted the matter before Vigoi Ward Tribunal, which was decided on the plaintiff's favour and ordered the first defendant to cause vacant possession, but the 1<sup>st</sup> defendant defied the order. The dispute landed to the District Land and Housing Tribunal, whereby the ward tribunal's decision was nullified. Thus, decided to file a fresh case in this court. Insisted that, the land in dispute belonged to her late father, any allocation to the first defendant was illegal.

In cross-examination, PW1 adduced further that, having noted the trespasser's presence in the disputed land in year 2016, she could not take an immediate measures for she had family problems to attend and she was not yet an administrator. 

The second witness (PW2) was Mr. Josephat Lucian Ngasha, a plaintiff's cousin brother, who testified that, the first defendant Eleonoda Maumba is not known to him. After the death of the plaintiff's father, he was entrusted to take care of the land against trespassers. He could not cultivate the land for being vast. In year 2010, one Hassan Seif Mpili whose wife is the first defendant, sought permit from him to cultivate the land temporarily. He permitted him, cultivated maize and sesame among others. When he heard about the minerals project, he told Seif to leave that land, and returned the land to the plaintiff. The first defendant trespassed the land after the land was returned to the plaintiff. Yet in cross examination, he said the first defendant remained in the land when her husband Hassan Seif left. And that he did not attend the Village meeting concerning land survey in their village.

Hassan Seif appeared as PW3 and testified that, he was living in Epango Village, then shifted to Mdindo in 2010 where he was leased the land in dispute. Married Eleonoda in year 2014 and occupied that land with her wherein they built a permanent block house. In year 2016 PW2 told him to leave the land, so he handed it back to PW2 and informed the 1<sup>st</sup> defendant. Insisted that he was the first to enter the land even before marrying the first defendant. In cross examination, said he did not know the plaintiff before. That as of now he left the village and is no longer a villager of Mdindo and never attended any village meeting. In re-examination, he said, the land had no sign of occupation when he first entered therein.



Evarist Njogolo (PW4) is living at Mdindo and testified to have known Yonatas Ngasha as a neighbour of his father's land. The first defendant once lived in his house and cultivated his farm (shamba) along with one



Sifa, her child. In cross examination he said he was present when the farms were distributed and the deceased Ngasha was given a land neighbouring to his late father. Hassan Seif had already occupied the land in dispute and built a hut therein when Eleonoda joined him. He stated, the boundaries to include one Daftari. In cross examination by the State Attorney, testified that he had been attending village meetings, including the one for surveying the land and issuance of Customary Right of Occupancy in 2019. He himself owns 47 acres of land, which was surveyed in that program.

PW5 Anna Daftari, testified that she has been a resident of Vigoi since 1988. The late Yonatas Ngasha was her neighbour, who owned the land in dispute. She does not know how and when Eleonoda came into the land, but she saw PW3 therein and later came Eleonoda living with Hassan. Eleonoda's claim of ownership since 2005 is not correct. In cross examination she testified that, she saw Evodia once. That she explained in the village meeting in respect to land survey and issuance of certificates. The surveyors took quite long time, owners were required to show the boundaries, in case of objection, one would report to village leaders.

Upon closure of the plaintiff's case, the defence case was called upon and the first defence witness was the first defendant Eleonoda (DW1), testified that, she lived at Msogezi Village with her husband since 1970. In 2001 her husband passed away and the clan members required her to be inherited as a wife to one of the deceased husband's siblings. She did not accept that idea, thus in year 2003, she moved to Mdindo Village living under her son at the house of PW4. In that village she saw a certain land with thick forest. She inquired on that land from the hamlet leader for a permit to cultivate, which request was allowed. She started clearing that

thick forest into a farm land. As such in year 2006 she managed to build a house therein. One Juma Nguku is among the people who saw her clearing that forest. In year 2019 she was registered in the village as the owner of the suit land and was issued a certificate of ownership after surveying it. She tendered the certificates of title and were collectively admitted marked exhibits D1 (a) and (b). Proceeded, there were several village meetings prior to the survey. All along, no dispute over her ownership arose, all her neighbours filled in the forms accordingly as the result, she was issued that certificate.

Testified that Evodia Ngasha was not known to her, the dispute arose after the advent of one company wanting to acquire vast land for minerals project. She admitted to have been married to PW3 in year 2010, but she said it was PW3 who moved to her home in the disputed land and not the opposite. She named the boundaries and neighbours including PW5.

DW2 Juma Mustafa Nguku, a Chairman of Mdindo Village, since 2019 testified that, he knew Eleonoda Maumba as his villager and neighbour since 2003, when she was living with her son to one Sifa Bomani. The disputed land was unoccupied thick forest. In year 2005 Eleonoda started clearing the forest and in 2006 she built a house therein. In 2019 she acquired a certificate of title through the process of land survey that was undertaken by the village. He himself got the title in 2018. The process was preceded by village meetings together with private and government surveyors. Detailed, he explained on the process of survey that there was a special committee to deal with land disputes before and during the survey. A 14 days period was given for any objection against the ownership. The land with no dispute was surveyed and they received their certificates, Eleonoda is among them.



Testifying on the plaintiff, DW2 denied to know Evodia Ngasha until in year 2019 when she instituted the dispute. Added that she does not own any piece of land, even her family does not reside in his village. Testified that the boundaries and neighbouring to the suit land confirmed same belongs to the first defendant during survey. In cross examination, he said they have a villagers' register used for development purposes. Evodia Ngasha is not registered in the village register. In respect to Anna Daftari he testified that she is known for having a family land, but herself is not a resident of his village.

DW3, Deogracias Raphael Idele testified that, he is a Health Officer of Mbindo Village since 2012. In 2018 he acted as a Village Executive Officer up to January, 2019. The Proper Land Use Project is among the activities which were undertaken under his leadership. The project aimed at rearranging proper use and ownership of land in the village from 2018 to 2019. It was advertised through Ulanga Radio FM. Also, there were seminars and awareness creation to the villagers. Then the Land Officers from the District came to conduct survey. Two committees were formed, one was accompanying the surveyors and another was for settling disputes. Hamlet chairpersons and other members were appointed to those committees. When the surveyors were conducting the survey, they were accompanied by the first committee and the owner of the land was the one to locate boundaries. During survey, neighbours were involved in each piece of land by furnishing other information like names and size of the land.

Accurately explained, the disputes committee was responsible to settle disputes, and most of the villagers settled their disputes. All the village was surveyed and all villagers were given their certificates. No land

had any unresolved dispute. Eleonoda Maumba was one of the villagers whose land was surveyed and there was no dispute over the same throughout the process. Added that, he did not know the plaintiff until when she came for the first time to his office with the citation for probate case. He knows Evodia's husband was in the village, healthy and with his business. He denied to know any land owned by the plaintiff.

Added that the boundaries mentioned in the plaint comprised the land that belong to the first defendant and not the plaintiff and the same does not constitute 16 acres. He properly identified exhibit D1(a) and (b) collectively. In cross examination, he defended that, the project was legal and valid, undertaken in other districts as well including Ulanga. Ngasha's clan is not in the village register. The Village has five hamlets, the disputed land is in Masoko hamlet. Likewise, he denied that PW3 is not known to him.

After closure of both cases, counsels were given time to file their final arguments. Ms. Madafu recited the background of the dispute and complained that the plaintiff instigated the case for greed after hearing about the Mahenge Minerals Company, which contemplates to acquire the land for compensation and prayed that the first defendant be declared the rightful owner, costs and damages be awarded. The submissions will be considered in the course of determining the issues.

From the pleadings and testimonies, the following are facts not in dispute; **first**, the parties are in loggerhead over the same land whose boundaries are explained by both parties; **second**, there was a proper land use project conducted by the second defendant under supervision of the third defendant in the whole village of Mdindo; **third**, all villagers who



owned land had their plots surveyed and issued certificates of a customary right of occupancy including the 1<sup>st</sup> defendant; **fourth**, the plaintiff never participated in the said project; **fifth**, according to the official registers kept by the second and third defendant, the land in dispute comprises 7 acres which was given to the 1<sup>st</sup> defendant.

Having so identified all undisputed facts, I will recite the guiding principles of law on proof of fact in civil suit. The person who brings an action before the court of law bears the burden of prove and bears the evidential burden over what he is claiming. This principle in our jurisdiction, it provided for under section 110 and 111 of **The Evidence Act, [Cap 6 RE 2019]** that: -

*"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.*

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

The standard of proof in civil cases is on preponderance of probability. The same is derived from section 3 (2)(b) of **The Evidence Act**. Also, this court's decision in **A. M (Ltd) Vs. A1 Outdoor Tanzania Ltd and Others [2007] TLR. 1**. It is on the basis of those principles of evidence, I will now proceed to examine the evidence on record. The first crucial issue is on the lawful owner of the suit land. It is known, ownership is a matter of fact which requires evidence to establish.

According to the evidence the plaintiff stated that, the land in dispute is part of 16 acres owned by her late father whose estate she



administers. Mr. Josephat Lucian Ngasha (PW2), Hassan Seif (PW3), Evarist Njogolo (PW4) and PW5 one Anna Daftari supported that evidence. PW4 specified that the deceased was allocated such land in year 1972. On the defence side, first defendant held that she acquired the suit land by clearing an unoccupied forest. Later on, she faced the local government and was granted right to use it, this was supported by DW2 and DW3.

The plaintiff suggests that, plaintiff's father was the first and original owner of the suit land. At onset, I would point out that, the plaintiff's evidence was not clear on the root of title. The plaint disclosed simply that the deceased Yonatas Ngasha acquired the suit land in year 1965 and settled therein up to his demise as per paragraph 6 of the plaint, which is quoted herein for easy of reference: -

*"That the disputed land was and has always been, the property of Mzee YONATAS NGASHA who acquired it by clearing bush sometime back in 1965. Mzee YONATAS NGASHA established the farm and he and his family have been living of it, until his death in 1995 whereupon the farm continued being the family asset for use by those left behind by the deceased"*

PW4 Evarist Njogolo on cross examination testified that the late Yonatas Ngasha was distributed the said land in year 1972, without describing who distributed/gave him and the nature of such distribution. To quote his verbatim words he said: -

*"When those farms were distributed in year 1972, I was present and the deceased Ngasha was a neighbour of my late father"*

At the same time, PW1 testified that PW2 told him that he invited the 1<sup>st</sup> defendant into the land. PW2 himself stated that he did not know



Eleonoda and did not invite her, but PW3. Yet PW3 himself said he was leased and not invited for free. His testimony is highly questionable and shaky, why did he build a permanent house knowing that he was invited therein temporarily? Why he would move away after separating from DW1 leaving her in the land if at all he was the host to her? The rule has been stable for decades that, unexplained contradictions and inconsistencies may depreciate the evidence, unless the court has resolved them to be minor and obvious under the circumstances and in **Happy Kaitiri Brilo t/a Irene Stationary & Another Vs. International Commercial Bank (T) Ltd, Civil Appeal 115 of 2016**, the Court of Appeal gave the remedy to the situation where facts pleaded are not supported by the evidence: -

*"Settled is the principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."*

PW4 and PW5 apart from being neighbours to the land in dispute, were involved in the survey process. According to them, DW1, DW2 and DW3 the survey process was preceded by seminars and public awareness campaign. Comprehensive consultation and involvement before survey and issuing any certificate of right of occupancy were done. Any land in dispute would not be surveyed until the dispute was resolved. Knowing that the land did not belong to the first defendant, neither the witnesses above nor the plaintiff did inform the surveyors or village leaders or prefer any objection when she was located that land. Even in civil cases, the test of materiality of the contradiction or inconsistency is equally tested as to whether goes to the root of the case or not. The same was pronounced in the case of **Ombeni Kimaro Vs. Joseph Mishili t/a Catholic**

**Charismatic Renewal, Civil Appeal No. 33 of 2017**, the Court of Appeal observed the same, that: -

*"The position of law is that for a contradiction or inconsistency or omission in evidence to be considered material, it must not be a minor contradiction, the inconsistency must be going to the very substratum of the case for it to be considered a material inconsistency"*

In this case, DW2 and DW3 did not know the plaintiff and to them she was never a villager of Mdindo. PW3 did not know her, PW4 and PW5 saw her only once. According to village leaders, Yonatas Ngasha's family did not reside in the village nor any member was registered in the villagers register. The above adversely infer that the plaintiff was not a villager and if at all she had ever been there, she and her witnesses (the villagers) did not file any objection against the first defendant before or during survey because they knew the plaintiff was the true owner. From the defence evidence, PW4 and PW5 were witnesses to the issuance of Exhibit D1 (a) and (b). Silence is admission against one with duty to speak. The witnesses would equitably be estopped to testify the contrary.

One of the oldest decisions by the High Court Chancery for England and Wales in the case of **Hunsden Vs. Cheyney [1690] 23 E.R. 703**, is among the relevant proponents regarding estoppel, where it was *inter alia* held: -

*"A person witnessing a document would be estopped by virtue of being a witness at most from denying the formality of its execution."*






Taken together, the above contradictions and inconsistencies depreciate the plaintiff's case to the extent that the defence evidence is much stronger than that of the plaintiff. From paragraph 10 of the plaint, PW2 and DW1 statement, I am moved by Ms. Beatrice Madafu's observations, that the suit was motivated by lust for money expected from the mining project compensation.

After considering the evidence from both sides regarding the first issue, this court has resorted to the conclusion that, when the first defendant cleared the bushland, the land was not occupied and thus, belonged to the Village Council and not the plaintiff or the plaintiff's deceased father. In clearing such land, the first defendant was undergoing the process of permanent right over that land as it is known to be among the crucial ways of acquiring some form of permanent rights over land.

This court has followed the position in the old case of **Kimenanga Vs. Mevomngori Mosoni (1962) L.C.C.A 42** in several occasions. Although acquiring title by clearing virgin land goes in fade, this court is of the view that when someone with genuine intent and without any trespass pretext, had actually cleared the land when the principle was applicable, his right should equally be protected.

Apart from the inconsistencies from the plaintiff's evidence as above analysed, this court has failed to accept a suggestion that the late Ngasha occupied the land effectively since 1965 to his demise in year 1996, yet the land to have no sign of human activities in 2016 as per testimonies of DW1, DW2, DW3 and PW3. This is despite the fact that there were some old mango trees and that PW1 said a house foundation was built, but not proved. The first defendant who cleared the bushland by the village



permission, cultivated it, built a permanent house therein and resided thereon up to 2019 when the dispute arose, apparently 13 years, was the owner of the land in dispute even before the survey and registration.

The second issue is whether the issuance of the customary right of occupancy to the 1<sup>st</sup> defendant was lawful. The plaintiff strongly submitted that the issuance of the right of occupancy to the first defendant was illegal as the land upon which a right issued was already occupied by the late Yonatas Ngasha whose estate, the plaintiff administers. The defendants held a firm position that the issuance was legal as made by the proper authority. It is the Village government itself to tell the legality.

I understand that the Certificate was issued under section 25 of **the Village Land Act [Cap 114 RE 2019]** which provides for the grant of Customary right of occupancy as follows: -

*"25.- (1) Where a contract for a grant of a customary right of occupancy has been concluded, a village council shall, within not more than ninety days of that conclusion, grant a customary right of occupancy to the applicant who accepted the offer referred to in section 23 by issuing a certificate, to be known as a 'certificate of customary right of occupancy' to that applicant.*

*(2) A certificate of customary right of occupancy shall be -*

- (a) in a prescribed form;*
- (b) signed by the Chairman and secretary of the village council;*
- (c) signed or marked with a personal mark by the grantee of the customary right of occupancy to which it relates at the foot of each page of the certificate;*





*(d) signed, sealed and registered by the District Land Officer of the district in which the village is situate."*

Under section 23 of **The Village Land Act**, the Village Council (in this matter, the second defendant) is empowered to determine application for grant of customary right of occupancy made under section 22 by a villager or any eligible person. No dispute that all officers involved in issuing the certificate to the first defendant had proper powers as they did and the plaintiff did not seem to challenge the powers of the second and third defendant respectively. All factors considered, it may grant the right of occupancy and the third defendant shall sign, seal and register it under section 25 (2)(d) of **the Act**. Exhibit D1(a) and (b) had all the requisites.

Generally, a grant of customary right of occupancy under the above and other corresponding provisions is valid and lawful until otherwise discovered to have been procured by corrupt transactions. Despite the above, the plaintiff believes the issuance of customary right of occupancy to the first defendant was illegal. The illegality averred is mainly on fact allegations that the second and third defendant wrongly believed that the land belonged to the first defendant and on such mistaken belief, issued a certificate of right of occupancy to the first defendant. Without prejudice to the holding in the first ground, this court is justified to study the whole process of granting the said right of occupancy to the first defendant.

According to PW3, PW5 and all defence evidence, the whole process of verification and survey of land was much involving and as earlier observed it was preceded over by public awareness campaign through mass media. In the whole process which took about a year, neither objection was preferred nor any dispute arose over the suit land. The first




defendant was known for quite long time to be the owner of the land in dispute. The defence evidence had established that the first defendant was in all respect the owner of the land in dispute and the issuance of certificate having followed the whole procedure required by law was proper, valid and legal.

Also my general observation as *obiter dictum*, even assuming that the late Yonatasa Ngasha once occupied the land in dispute since 1965 as per plaint or 1972 as per PW4, same would not automatically establish that such land fell within the estate of Ngasha at the time of dispute. Considering the land reforms undertaken in Tanzania like *Customary Tenure Conversions from 1964 – 1969* and *Ujamaa Villagisation 1970 – 1980*, whose reforms, among others, all rights under customary law before "Operation Vijiji" were extinguished under section 3 (1) of the **Regulation of Land Tenure (Established Villages) Act No. 22 of 1992**.

It follows therefore that, apart from proving that someone ownend the land in years like 1965 or 1972 as herein claimed, one must establish that he remained the owner even after the reforms and never abandoned it at any point in time. The plaintiff in this case did not lead cogent evidence, even the time the deceased started to own that land in dispute was not established clearly.

The last issue is on the reliefs. Each part prayed for declaratory orders and costs, however reliefs are always subject to detrmination of the main issues. On the basis of the findings, this court holds that the plaintiff's case is weak for inconsistence and contradictions than that of the defendants, which in total is strong, unified and straight forward establishes the rightful ownership of the land in dispute is the first

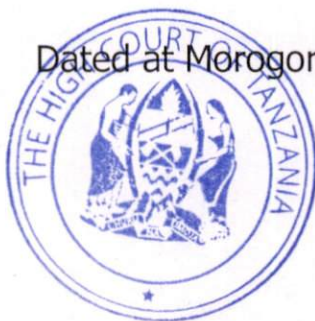




defendant. I proceed to rule that the plaintiff's case is dismissed in total, the defendant remains and is declared as the rightful owner of the disputed land.

With deep consideration on the litigation fairness and that the four defendants have unnecessarily suffered costs. Likewise, the first defendant has been in tribunals since 2019 as the background shows. With all fairness, defendants deserve costs as prayed. I thus order costs be payable to all defendants save only to the third defendant whose case was held by the 4<sup>th</sup> defendant.

**Order accordingly.**



Dated at Morogoro on this 1<sup>st</sup> day of December, 2022.

**P. J. NGWEMBE**

**JUDGE**

**01/12/2022**

**Court:** Judgment delivered in Chambers at Morogoro this 1<sup>st</sup> day of December, 2022 in the presence of Jozbet Kitale holding brief of Kambamwene advocate for the plaintiff, and advocate Hemedi Said SA holding brief of Beatrice Madafu Advocate for the first defendant and Mr. Hemed Said Mkomwe learned State Attorney for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

**Right of appeal to the Court of Appeal fully explained.**

**Sgd. A.W. MMBANDO**

**DEPUTY REGISTRAR**

**01/12/2022**

