

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

LAND CASE NO. 21 OF 2017

ABDALLAH NAMINU 1ST PLAINTIFF
OMARY MISSANDE 2ND PLAINTIFF
ABDALLAH KIGUNGULU..... 3RD PLAINTIFF
HASSANI MKAMILA..... 4TH PLAINTIFF
SALUM MWEGIO @MANGORO 5TH PLAINTIFF
HASHIM NGOTWIKE..... 6TH PLAINTIFF
RAMADHANI MANDUTE 7TH PLAINTIFF
SADIK MPILI 8TH PLAINTIFF

VERSUS

SELEMANI KATUMBALA 1ST DEFENDANT
MOHAMED MHOLELE 2ND DEFENDANT
NASSORO MAUMBA 3RD DEFENDANT
ABDALLAH NGABENA 4TH DEFENDANT
MBELE KINGENGA 5TH DEFENDANT
KIDOGO BASI VILLAGE COUNCIL 6TH DEFENDANT
KILOSA DISTRICT COUNCIL 7TH DEFENDANT

Date of last order: 29/11/2022

Date of Judgement: 03/03/2023

JUDGEMENT

MGONYA, J.

The Plaintiffs above has instituted a suit against the Defendants praying for the following orders:

- 1. Tshs. 220,000,000/- being compensation for damages arising out of nine damaged houses; in alternative;***
- 2. The Defendants be ordered to reconstruct the damaged houses at their own costs;***
- 3. That, the Defendant be ordered to pay the Plaintiffs Tshs. 100,000,000/- being compensation in a monetary term for the inconvenience and disturbance caused to them;***
- 4. This court be pleased to order the Defendants to hand over the premise invaded by the Defendants to the Plaintiffs unconditionally; and***
- 5. Cost of this suit be paid by the Defendants.***

According to the Plaintiffs, the Plaintiffs houses and material property at Kidogobasi Village, Kilosa in Morogoro Region claimed to have been invaded and demolished by Defendant without notice or any justification. The estimated value of the nine houses demolished by Defendants is **Tshs. 220,000,000/=**.

The said claim has been strongly opposed by the Defendants through their Written Statements of Defence. Beginning with joint Written Statement of Defence for 1st, 2nd, 3rd, 4th and 5th Defendants, particularly paragraph 3, 4, 5 of the same denied to have invaded and demolish the Plaintiffs'

houses and the Plaintiffs are still occupying their residential houses and other alleged business premises are not known to the them.

As for the 6th and 7th Defendants Joint Written Statement of Defence, they stated that no legal documents have been attached to prove ownership and how they acquired the disputed land. According to them, the land in dispute is planned for public market and not for residential as alleged by the Plaintiffs.

During framing of issues, the following issues were agreed by parties and adopted by the court for determination;

- i. Whether the Defendants invaded and demolish any houses belonging to the Plaintiffs?***
- ii. Whether the Plaintiffs have legal ownership of the land they claimed to have constructed their houses?***
- iii. If the answer to the 1st and 2nd issues are affirmative what loss if any did the Plaintiffs suffered? And;***
- iv. To what reliefs to the parties intitled to?***

On the date of hearing and in filing final submissions, Plaintiffs were represented by **Jackson Liwewa**, Learned Counsel from CBS Law Chambers, learned Counsel **Thomas**

Rwebangira appeared for 1st to 5th Defendants while **Lukas Charles Malunde** PSA represented the 6th and 7th Defendants.

In establishing their claim, the Plaintiffs relied on 10 witnesses. for Plaintiffs case were Omary Ali Masinde(**PW1**), Abdalah H. Kingunguli(**PW2**), Sadiki Mohamed Mpili (**PW3**), Shomari Hassan Kingunguli (**PW4**), Hassan Mkamila (PW5), Hassan Mkamila (**PW6**), Hashim Ngotwike (**PW7**), Ramadhani A. Mandatute (**PW8**) Salum .M. Mpili Mwegio (**PW9**), and Ali Ibrahimu Mbinu (**PW10**). All these witnesses testified to have acquired the suit land through being allocated by Kilosa village Council in the year **1996** and they have used it without interference for period of **21 years**.

That on 10th February 2017 the Defendants convened a meeting and went on to demolish the Plaintiff's houses situated on Kidogobasi village, a planned area for public market. According to **PW1 Omary Masinde's** testimony, he stated he pray for compensation from Defendant for demolishing his houses. That he occupied the area since 1974 and he was given the area in dispute by Kilosa Village Council in the year 1996 together with other Plaintiffs. That since the said allocation (1996 to 2017) they have been using the land without any disturbance or intervention. According to him on 10/02/2017 Defendants unlawfully conducted the said demolition to their

houses without any notice, the act which subjected them to big loss.

During cross examination, PW1 confessed to have no exhibits to justify that he had a house and the same was demolished by the Defendant's.

PW2, PW3, PW4, PW5, PW6, PW7 and **PW8** they all testified that on 10/02/2017 at around 4 P.M., the Defendants approached them in a group and demolish their houses and business properties. During cross examination the above witnesses who are also party to this case admitted that the disputed areas were given to them by the Village Government for business purpose in the year 1996.

Furthermore, **PW10 Hassan Ibrahim** who is the village Executive officer from the year 1995 to 2005 testified that the disputed area was given to the Plaintiffs by the Village Council to build small hurts "vibanda" so that they may be used as market therefore the disputed area was for market purposes and not residential.

Defence brought five witnesses Selemani Katumbala (**DW1**), Abdalah Ngabena (**DW2**), Mohamed Said Msholele (**DW3**), Mbeza Ally Magogo (**DW4**) and Nasoro Maumba (**DW5**). All these witnesses unanimously denied to have demolished Plaintiffs' house and other business structures or

seen the occurrence of demolishing Plaintiffs' properties on 10th February 2022. They testified that, the disputed land is allocated for market for petty traders and belongs to the Village, therefore petty traders were required to pay levy to the Village Council.

DW1 Selemani Katambala denied to have any leadership in kidogobasi Village and he stated that the area in dispute is market place and there are small huts built with sticks which are temporary for small traders and not permanent structures.

During cross examination he stated that the area was located for business only and the market inclusive. Neither the witness also denied to have knowledge of the village meeting on 10th February 2017.

DW2 Abdallah Ngabena, DW3 Mohamed Said Msholele , DW4 Mbela Ally Magego and DW4 Nassoro Maumba all these witnesses denied to have demolishing the Plaintiffs houses.

DW6 Rashid Salum who is the Chairman of the Kidogobasi Village testifying before the court, he denied to have seen any event of houses being demolished within his jurisdiction on 10th February 2017.

After the closure of Defence case, the court ordered the final submission to be adduced by way of filing written submissions. I thank both parties for adherence to the schedule and the same has been helpful in constructing this judgement.

Referring to Mr. Jackson Liwewa the learned Advocate for Plaintiffs, for the first issue, in their final submissions, was of the view that, all Plaintiffs have managed to prove that on 10th July 2017 Defendants herein convened the meeting and went on to demolish the Plaintiffs' houses situated at Kidogobasi village, and on this note, Plaintiffs have succeeded to prove the demolition. He pursued the court to rely on their evidence to reach its decision as it was held in the Case of **Kansius Marwa Vs R 2017 (TLS) LR 377** where the court held that Courts has to rely on ample evidence to arrive on its decision.

For the **second** issue as to whether the Plaintiffs have legal ownership of the land, they claimed to have constructed the houses? The learned counsel submitted that, Plaintiffs have proved ownership and have been using the suit land for a very long time for about 21 years and constructed houses for business. In his opinion, the Plaintiffs have proved to have been given the suit property by the Village Government, as testified by Village Executive Officer (VEO) by explaining the whole process of allocation. From the above, it was submitted that, Plaintiffs have therefore, succeeded to provide ample evidence

and consistence of evidences to support Plaintiffs claim of being legally given the disputed land by the Village Government.

According to him, all Plaintiffs testified from the inception that they had houses at Kidongobasi Village, Kilosa District, in Morogoro Region which were invaded by Defendants and reduce them into dust and causing loss of both houses and material property whose estimated value is **Tsh 220,000,00/=**. In his opinion their evidence were consistence to prove their case as it was held in the case of **AFRICA MWAMBOGO V REPUBLIC (1984) TLR** where it was held that:

"Consistence evidence may establish proof of certain action".

In response to the Plaintiffs' Counsel final submission, Advocate **Thomas Rwebangira** for 1st to 5th Defendant submitted that:

For the **1st and 2nd issues**, the Plaintiffs have failed to prove demolition as well as ownership of the land in dispute. It was further submitted that, the throughout the trial, Plaintiffs have failed to prove that they had houses and failed to prove the allocation of the disputed area and the size of their respective land and houses. Also, Plaintiffs failed to prove how can the 6th and 7th Defendants who are not natural person could

participate the demolition of Plaintiffs' houses. In his opinion Counsel said, since Plaintiffs claimed to have been given the market area therefore were mere tenants and they have to pay levy and failure to that, the Village Council can take back the land at anytime.

The learned Counsel further submitted that, Plaintiffs not only failed to prove that their houses were demolished by the Defendants but also failed to prove their ownership to the disputed land. As such they cannot claim to have suffered any loss **Tshs 220,000,000/-** without any proof.

For the 6th and 7th Defendants Advocate **Lucas Charles Malunde**, learned Principal State Attorney (PSA) submitted that the Plaintiffs have failed to prove the involvement of 6th and 7th Defendants in demolition allegations on 10th February 2017 without notice. That they have failed to prove the value of the demolished houses contrary to **section 110 (2) of the Evidence Act.**

Learned PSA further added that, on the issue of ownership of the disputed area, the Plaintiffs admitted the disputed area to be market area belonging to the Village Government as it was testified by **PW 6** and collaborated by **PW 10, DW 1, DW3, DW4, DW5** and **DW6**. According to him, there is no supportive evidence to prove Plaintiffs' ownership but rather admitted that the suit land belongs to the Village Government. He cemented

his argument by making reference to the case **E.M TRUCKING CO. LTD VS. JITEGEMEE TRADING CO. LTD AND MAJEMBE AUCTION MART, LAND CASE NO. 25 OF 2014.**

Consequently, the learned PSA, concluded that, Plaintiffs have failed to prove their case in its entirety.

Having summarized the evidence brought before the court and going through the sequence of this suit, let me now deal with the issues framed. I would, according to the nature of the suit and the evidence in the records, wish to combine all issues collectively in my analysis.

It is trite law that whoever desires a Court to give Judgment in his/her favour, he/she must prove that those facts exist. This is provided under **Section 110 (1) (2) and 112 of the Evidence Act, Cap. 6 2019.** These provisions place the burden of proof to whoever desires the court to give Judgment as to any legal right or liability dependent on existence of facts which he/she ascertain. In the case of **ANTHONY M. MASANGA VS. PENINA (MAMA MGESI) AND LUCIA (MAMA ANNA), CIVIL APPEAL NO. 118 OF 2014 CAT** (Unreported), it was held that the party with legal burden also bears the evidential burden on the balance of probabilities. Also, in the case of **HEMED SAID VS. MOHAMED MBILU (1984) TLR 113**, it was held that:

"According to the law, both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".

It is also a settled law that parties are bound by their own pleadings and that a party shall not be allowed to depart from his pleadings to change its case from what was originally pleaded. This presupposes that a party should parade evidence to prove or support what he has pleaded. See ***AGATHA MSHOTE VS EDSON EMMANUEL & OTHERS (CIVIL APPEAL NO. 121 OF 2019) [2021] TZCA 323; (20 JULY 2021 TANZLII).***

Mindful of that, I will address my mind into the pleadings filed in relation to this case. According to pleadings particularly paragraph **6, 7** and **8** of the Plaintiff and the evidence on record, it is the Plaintiff's assertion that they own disputed land after being allocated by Village Government officially in the year 1996. And the said area is located at Kidogobasi village, Kilosa District at Morogoro Region. All Plaintiffs testified to have used the land in dispute for the period of 21 years until demolition by the Defendants. The same area was allocated to them for the purpose of building small huts "vibabda" so that they may be used as market.

As stated above, the law is settled in civil cases that the burden of proof lies on the party who alleges anything in his favour. See; **Section 110 of the Law of Evidence Act Cap. 6 [R. E. 2019]**. This legal position is underscored in **ANTHONY M. MASANGA V. PENINA (MAMA MGESI) & LUCIA (MAMA ANNA) CIVIL APPEAL NO. 118 OF 2010 (Unreported)** where the Court observed:

" Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour"

Now in determining the **first issue** as to **whether the Defendants invaded and demolished any house belonged to the Plaintiffs on the disputed land?**, All Plaintiffs have alleged that on 10th July 2017 Defendants convened a meeting and went on to demolish the Plaintiffs houses situate at Kidogobasi Village. That they had houses at eneo la Kidogobasi village, Kilosa District, in Morogoro Region which were invaded by Defendants and reduce them into dust and causing loss of both houses and material properties whose value is estimated at **Tsh 220,000,00/=**. Although learned counsel Liwewa argued that all Plaintiffs has testified on issue of demolition therefore their testimonies were consistence, hence they have proved their case. In support, he invited the

court to the case of ***AFRICA MWAMBOGO V REPUBLIC 1984 TLR*** which held that consistence evidence may establish proof of certain action. It is my opinion that when the matter is for demolition of properties like houses, consistence evidence is not enough to justify the demolition but also there must be a collaborative evidence to justify the same. On the record even exhibits to justify the demolition allegation were not tendered. None of the Plaintiffs has provided the evidence proving the state of houses demolished before and after the incidents. Only mere words which do not prove or rather justify the allegation. With profound respect, I agree with Advocates for Defendants that Plaintiffs have failed to prove that their houses were demolished by the Defendants and hence they have failed to prove alleged loss suffered by them of **Tshs. 220,000,000/=**. in my considered opinion, the first issue is answered **NEGATIVELY.**

Turning to the second issue as to **whether the plaintiffs have legal ownership of the disputed land**, they claimed to have constructed the houses?

Now in determining this issue, the law is also settled that a person who alleges must prove and the standard of proof in civil cases is on balance of probabilities by weighing the evidence. See ***GEITA GOLD MINING LTD & ANOTHER VS. IGNAS ATHANAS, CIVIL APPEAL NO. 227 OF 2017; ANTONY M.***

MASSANGA VS. PENINA (MAMA MGESI) & LUCIA (MAMA ANNA) CIVIL APPEAL NO. 118 OF 2014 (both Unreported).

Undoubtedly, this is a question of evidence. In this suit, it was shown and proved by the Plaintiff that the suit land was initially owned by the Kidogobasi Village and the same was allocated to them for the purpose of establishing small market so that to generate levy. This that was also evidenced by the testimony of PW6 and PW10 who was the Village Executive Officer of Kidogobasi at the time of allocation of the same to the Plaintiffs. There is no exhibit tendered before the court proving ownership of the said properties by the Village Council. PW10's evidence is crucial since he was involved in allocation of the said disputed area for market purpose. The Court of Appeal of Tanzania in **PAULINA SAMSON NDAWAVYA V. THERESIA THOMAS MADAHA CAT, CIVIL APPEAL NO.45 OF 2017** (Mwanza- unreported) observed the following on how to discharge a burden of proof in civil case;

"That degree is well settled. It must carry reasonable degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal 10 can say - We think, is it more probable than not, the burden is discharged."

In the present case, weighing the evidence adduced by parties for and against proving the ownership of the suit land, I am satisfied that the Plaintiffs' evidence has less weight thus have not managed to discharge their duty by proving ownership on balance of probability.

Referring to their testimonies, all Plaintiffs claimed to have been allocated the land in dispute for purpose of establishing market. So, from their evidence, it is clear the suit land is planned area for market. They proved how and when the Village Council was involved in allocating the suit land for small market for the purpose of generating levy. The Plaintiffs also admitted the disputed area to be market area belonging to the Village Government.

As to the issue of ownership, I have gone through the evidence of the Plaintiffs who claimed that they occupied the suit land from 1996 after being allocated the land in disputes by the Village Government. Unfortunately, there is no any other independent or any other corroborative evidence to back up their claims that the said allocation made them the lawful owner of the suit land and the purpose of allocation the land in dispute changed from market planned area to residential area and the same houses were demolished by the Defendants through the decision of the Village Assembly. **Section 14 of**

the Village Land Act provides for a land which or may be held for customary right of occupancy, and that the person occupying that land shall be entitled to receive compensation. In absence of any other corroborative evidence or documentary evidence to prove ownership of customary right, how does the court believe to its satisfaction that the claiming the ownership by Plaintiffs make them lawful owner of that particular land? **Section 14 (4) of the Village Land Act** provides as follows;

"If any question arises as to whether a person in occupation of land is a person to whom the provisions of subsection (2) applies, that person shall be deemed to be the person unless the contrary is proved to the satisfaction of a Court..... " (Emphasis added).

The simple interpretation of the above provision is that if a person occupies a land under a Customary Right of Occupancy, then if there is any question about his/her occupancy and whether the occupancy fall under the provision of **Section 14(2)** of the **Village Land Act**, then unless there is a contrary proof to the Court, then that person shall be deemed to be the customary owner hence deemed to be entitled to the compensation.

Further that the said areas therefore was not planned for residential purposes, neither for permanent infrastructures.

Now the question comes, if at all they decided to build permanent structures, then: **1st** who permitted them; **2nd** how can one build permanent structure to the land that he does not own?

Since the plaintiff has failed to provide a sufficient proof of ownership of the suit property the resultant effect is that they have also failed to prove ownership of the suit land. On the way forward, I find no better guidance than the instructive decision of the Court of Appeal in **AGATHA MSHOTE VS EDSON EMMANUEL & OTHERS** (Supra) where the Court (Mugasha J. A.)

"In view of what we have endeavoured to discuss, the Appellant failed to prove her case on the balance of probabilities and It cannot be safely vouched that she had discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges that burden, as earlier stated, the weakness of the respondents' case. If any, cannot salvage the plight of the unproven appellant's case. In our considered view, we agree with the manner

in which the trial Judge addressed the second issue as to whether the respondents had trespassed into the land in dispute. We are fortified in that account because since the burden of proof was on the Appellant and not the respondents, and in the event she did not discharge the onus, the credibility of the respondents' account was irrelevant"

In the instant case, as I have observed earlier, the Plaintiffs have claimed to have been allocated the land in dispute by the Village Government for residential purpose or individual ownership. If so, the said Authority could have assisted them in possessing Customary Right of Occupancy. However, the evidence has proved to the satisfaction of this Court that the original owner of the suit land was the Village Government and the ownership has never changed but rather the Plaintiffs were using the said suit property as tenants as the dispute land is planned area for small market for petty traders. Therefore, in absence of supporting evidence on the part of the Plaintiffs, they remain to be tenants on the suit land. The second issue too is answered **NEGATIVELY.**

That said, it is the finding of this court that the Plaintiffs have not managed to prove their case on balance of probability

as the Plaintiff's evidence appears weaker to that of the Defendants. This Court is satisfied that the Plaintiffs have also failed to prove that they are the lawful owners of the suit land situated at Kidogobasi Village, Kilosa District in Morogoro Region. On the foregoing, **the suit is DISMISSED with costs.**

It is so ordered.

Right of Appeal Explained.



L. E. MGONYA

JUDGE

03/03/2023