

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE NO. 7 OF 2021

SALIMU AMAN SHABANI (Administrator of the Estate of the Late

Kajiru Kitivo Kiondo) **PLAINTIFF**

VERSUS

MABILIONI VILLAGE COUNCIL..... **1ST DEFENDANT**

THE ATTORNEY GENERAL.....**2ND DEFENDANT**

JUDGMENT

24/3/2023 & 21/04/2023

SIMFUKWE, J.

Salimu Aman Shabani is suing the defendants Mabilioni Village Council and The Attorney General claiming a landed property measuring 18 acres located at Kidundai area in Mabilioni village within Same District in Kilimanjaro region alleged to be part of the estate of the late Kajiru Kitivo Kiondo. The dispute between the parties is that the plaintiff claims that the defendants has trespassed into the said property which he asserts to belong to his late grandfather. The plaintiff herein under the capacity of administrator of the estate of the late Kajiru Kitivo Kiondo is praying for judgment and decree as follows:

- i. A declaration that the Plaintiff is the lawful owner as the Administrator of the Estate of the late Kajiru Kitivo Kiondo of the disputed land measured 20 acres.*
- ii. The 1st defendant to pay the plaintiff damages to the tune of Tshs.50,000,000/= for trespassing and preventing the plaintiff from developing his suit land.*
- iii. An order of perpetual injunction restraining the defendants, their servants, workmen, assignees, agents and whomsoever will be acting through them from interfering with the plaintiff's peaceful enjoyment of the suit land.*
- iv. The defendants pay the costs of and incidental to the suit*
- v. Any other relief(s) that the honourable court may deem fit.*

The defendants contested the claim through a Written Statement Defence. In their Written Statement of Defence, the defendants verified that the disputed land belonged to the Government thus Mabilioni Village since 1940s. Hence, they blamed the plaintiff for trespassing the disputed land.

During the trial, the plaintiff was represented by Mr. George Magoti, learned counsel while Ms. Glorian Issangya and Ms. Upendo Kivuyo, learned State Attorneys appeared for the defendants. Before the hearing commenced, the following issues were framed:

- 1. Whether the plaintiff is the rightful owner of the suit premises?*
- 2. If the above issue is answered in the affirmative, whether the 1st defendant has trespassed to the plaintiff's land?*
- 3. What relief(s) are the parties entitled to?*

The plaintiff called three witnesses while the defendants called two witnesses.

PW1 – Salimu Aman Shabani told this court that he was appointed as administrator of the estate of the late Kajiru Kitivo Kiondo before Hedaru Primary court. He tendered a letter of Administration which was admitted as **exhibit P1**. Having laid down his capacity of suing, PW1 stated the genesis of the dispute between him and the village government of Mabilioni to have emerged after the village had deposited building materials at the disputed land for building a school without his consent. He particularized that the disputed land which is measured 18 acres belonged to his grandfather the late Kajiru Kitivo Kiondo, whose estates is administered by him. He told the court that his late grandfather cleared the disputed land in 1944 and used the same until when he moved to another area. That, his grandfather passed away in 1995 but the whole clan of Kajiru continued using the said land for irrigation farming of onions and maize. PW1 elaborated that the dispute arose between 2017 to 2019. Thus, he decided to sue the village government together with the Village Chairman before Same District Land and Housing Tribunal. He produced a copy of judgment for the court to take Judicial Notice.

Explaining his intention of filing this suit, PW1 testified that he filed this suit for the court to declare him as a lawful owner of the disputed land. He prayed for compensation at the tune of Tzs 50,000,000/= as they had been deprived use of the said land since 2017. To justify the claim of Tshs 50,000,000/=, the plaintiff described that as a family, they used to earn approximately Tshs. 16,000,000/= per annum by cultivating onions and maize. That, each acre used to yield Tshs 3,000,000/=. In addition, the plaintiff prayed for costs of this case. In conclusion, he informed the court

that in the disputed land there are six graves of the family members of Kajiru.

When cross examined, PW1 clarified that they did not institute probate cause because they were using the said land by the whole family and there was no dispute. He also stated that their grandfather resided at the disputed land from 1944 to 1980 when he was forced to move to another place because of malaria. PW1 disputed the fact that the said land was used for 'Operation Vijiji'. He added that he used the said land from 2017.

PW1's evidence was supported by that of **PW2 – Wallece Daudi Kisaka** who asserted that he knew the dispute between the parties. He described the boundaries of the disputed land. It was PW2's testimony that he was once the village chairperson from October 2009 to August, 2014. He assured the court that the disputed land is the property of the clan of Mshana as he found it like that from his birth. That, in 1974 during 'Operation Vijiji', that area was not distributed to anyone. PW2 stated further that when he was a village chairperson, he was handed over 60 acres of the village which are far away from the disputed land. He clarified that, what he knows is that the disputed land is the property of Washana.

During cross examination, PW2 stated that during his leadership, the said farm was being used as a farm by Salimu Aman Shaban thus, he disputed the fact that the disputed land was not being used.

The last witness on part of plaintiff was **PW3 Ngoka Anthony Sevule**, who testified that he was a resident of Mabilioni Village since 1970 when he was born. He said that he knew Salimu Amani Shaban who had a land dispute with Mabilioni village from 2017 to date. PW3 described the disputed property and its boundaries and averred that he was their

neighbour. PW3 explained further that the disputed land was the property of the late Kajiru Kitivo the plaintiff's grandfather.

During cross examination, PW3 stated inter alia that the said area has been restricted by the government since 2017. That, prior to that the said area was possessed by the plaintiff and he was using it.

While answering the questions posed by Ms. Upendo during cross examination, PW3 stated that what he saw was trespass by the village on allegation that they wanted that area to be a school area. That, the village stopped the plaintiff from cultivating the area as he used to cultivate maize, onions and other vegetables.

The defendants called two witnesses namely, **DW1 Mr. Allen Mwaka Kakinda** and **DW2 Mr. Gabriel Gangala Mcharo**.

DW1, Mr. Allen Mwaka Kakinda, chairperson of Mabilioni Village, among other things testified that the dispute before this court concerns encroachment of the village land measured 18 acres by 'Washana' people. Advancing the reasons for testifying that the disputed land belonged to the village, DW1 stated that since his birth, he had never seen Washana cultivating that area. That, in 1975 during 'Operation Vijiji', that area was allocated to Gunge Hamlet and by then it was uncleared land. Meanwhile, the disputed land is within Kidundai hamlet after Gunge residents went back to Gunge and left the land to be a village land.

DW1 testifies further that the government had built a godown for cotton in 1977. After being encroached by the plaintiff Mr. Salimu Aman, the disputed land has been cleared and used as a farm.

DW1 disclosed that he knew the plaintiff because they reside together at Jitoweni B Hamlet. He tendered the residence register to substantiate the fact that the plaintiff and Washana people are residents of Jitoweni B. The residence register was admitted as **Exhibit D1**. He said that Washana had never been residents of Kidundai hamlet.

DW1 went on to state that the dispute arose in 2017/2018. Prior to that the land was owned by the village. That, in 2015 the village intended to build a secondary school at the disputed land. Thus, they collected building stones at the said land in 2015. However, the plaintiff removed the collected stones from the site. Following that act, they reported to the Division officer who directed the Ward Executive Officer to convene a meeting. In that meeting it was decided that they should proceed with the construction.

DW1 continued to tell the court that, the matter was reported to the District Commissioner who advised that ten acres should be for building a school while 8 acres should be left to the plaintiff but the plaintiff refused. He elaborated that the plaintiff was given 8 acres not because he was the owner of the disputed land but because he was a resident of that area.

DW1 was of the view that the plaintiff encroached that land because of two reasons: first, he was about to retire as a teacher. Thus, possibly he wanted to have more properties. Second, there is a modern canal at the disputed land which encourages cultivation of onions and maize. He insisted that the plaintiff had never cultivated the area previously.

During cross examination, DW1 said among other things that there were documents handed over to him including the village map which shows the boundaries of the village though he did not tender it. He contended that

he knew the village area as you cannot supervise something which you don't know. He further said that in the disputed land there are remains of the godown of the government and the graves which were built after encroachment in 2017.

DW2 Mr. Gabriel Gangala Mcharo, told the court three things, first that in 1949, at the disputed land there was a Bush school. Second, when the school collapsed, in 1972 during operation Vijiji they were allocated to that area which was a bush. Third, the government built/constructed a godown for storing crops at the disputed land. That, they stayed there for three years then the District Commissioner ordered them to go back to Gunge. Thus, the disputed land remained to be the property of the village. That there were stones for school construction which were collected at the disputed land and it was not being used

DW2 testified further that he had never seen "Washana" people at the disputed land. That, they did not find them there and they left the land empty. He elaborated that the disputed land is the property of the village government otherwise they could not have been transferred to that area.

When cross examined by Mr. Magoti, DW2 stated inter alia that from the time they moved to that area there were no graves at that area.

That was the end of evidence from both the plaintiff and the defendants. Ms. Glorian learned State Attorney prayed to file written final submission and she filed her written submission timely. I appreciate the effort exhibited by the learned State Attorneys in their written submission, although I will not reproduce it verbatim but certainly consider it in the course of this judgment.

In determining the framed issues, my line of reasoning will be guided by the ever-cherished principle of law that in civil cases the standard of proof is on balance of probabilities. In the case of **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele & Others (Civil Appeal No. 66 of 2019) [2021] TZCA 168** [TANZLII] at page 8, the Court of Appeal stated that:

"The law places a burden of proof upon a person "who desires a court to give judgment" and such a person who asserts...the existence of facts to prove that those facts exist (Section 110 (1) and (2) of the Evidence Act, Cap.6). Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6)."

Sections 110 (1) (2) and 111 of the Tanzania Evidence Act, Cap 6 R.E. 2019, provide that the one who alleges must prove. As a matter of reference, the provisions reads:

110.-(1) *Whoever desires any court 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.*

(2) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person on whom burden of proof lies*

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 concept of balance of probabilities, has been elaborated in the case of **Ernest Sebastian Mbele** (supra) whereby the Court of Appeal at page 9 sought an inspiration from an Indian case of **Narayan Ganesh Dastane v. Sucheta Nayaran Dastane (1975) AIR (SC) 1534** which held that:

"The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that ...a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact...."

Applying the above principle in the instant case, on the **first issue on whether the plaintiff is the rightful owner of the suit premises**, it was the plaintiff's story that the disputed land belonged to his late grandfather the late Kajiru Kitivo who died in 1995. That, after his death the whole clan of Kajiru continued to cultivate the land. When cross-examined, PW1 said that he once used the disputed land from 2017. His evidence was supported by the evidence of PW2 who testified that the disputed land belonged to Washana clan and it was not distributed during 'Operation Vijiji'. When cross-examined, PW2 said that during his leadership from 2009- 2014 the land was used as a farm by Salimu Aman Shabani. Also, PW3 supported the plaintiff's case to the effect that the

disputed land was the property of the plaintiff's grandfather the late Kajiru Kitivo.

Defence witnesses testified that the disputed land was the property of the government. DW1 told the court that since his birth he had never seen Washana cultivating the disputed land. That, during 'Operation Vijiji' the said land was allocated to Gunga Hamlet. That, the government had built a godown in 1977. DW1 disclosed that the plaintiff was the resident of Jitoweni 'B' while the disputed land is located at Kidundai hamlet. That, the land was owned by the village and they intended to build a school.

DW2 supported the evidence of DW1 by stating that at the disputed land there was a bush school which collapsed in 1972. That, the government built a godown there. He also said that he had never seen Washana at the disputed land.

From the evidence above, I hesitate to believe the plaintiff's version of the story that the disputed land belonged to his late grandfather on two reasons: **First**, the plaintiff asserted that after his grandfather's death, the whole family was using the disputed land. However, he failed to call any family member to prove that they were using such land. Moreover, as rightly submitted by Ms. Upendo in her final submission, the plaintiff did not tender any documentary evidence to support the assertion that the disputed land was the property of the late Kajiru Kitivo Kiondo.

Second, on balance of probabilities, the defendants' evidence is heavier than that of the plaintiff since they have sufficiently established that the plaintiff's family members are not residing at that particular land and that prior to 2017 the land was owned by the Village and they intended to build a school there. The defendants also established that in that

particular land the government had built a godown since 1977. All defence witnesses testified that they had never seen the “Washana” in that land. That piece of evidence cast down the plaintiff’s case that they were using the said land thus making the defendants’ evidence heavier than that of the plaintiff.

As stated above, the one who alleges must prove. It is trite law that the burden of proof never shifts to the defendant until the plaintiff has discharged his duty. In the case of **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama (Civil Appeal No. 305 of 2020) [2021] TZCA 699 [TANZLII]** at page 14, the Court of Appeal affirmed that:

"It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case."

In the case at hand, I am of considered opinion that the plaintiff has failed to discharge his duty of proving the issue of ownership of the disputed land on balance of probabilities.

Apart from that, there are other factors which weaken the plaintiff’s case. **One**, there is self-contradiction on PW1's evidence in his examination-in-chief. According to PW1, since 1995 when his grandfather passed away, the said land was used by the whole clan of Kajiru for irrigation farming but at the same time during cross examination he stated that he used the said land once from 2017. This self-contradiction stained his credibility.

Second, witnesses of the plaintiff contradicted the story of PW1. While PW1 testified that the disputed land was used by the whole clan of Kajiru and that he once used the same from 2017, his witnesses particularly PW3 stated that the said land was used by Washana and when cross-examined he said that during his leadership (*In his examination in chief PW3 said that he was a village chairperson from 2009 to 2014*) the disputed land was possessed by the plaintiff who was using it for cultivation. From my point of view, the above noted contradiction is material one which touches the root of the case particularly the issue of ownership of the disputed land.

In my opinion, the defendants' evidence has sufficiently established that the disputed land belonged to the village. Evidence tendered by the defendants was to the effect that Washana people had never been seen at the disputed land. It is on that basis that, I am of settled mind that the defendants' evidence overweighs the plaintiff's case. Moreover, the defendants managed to narrate albeit briefly the historical background of the disputed land in so far as ownership is concerned.

On the basis of the above analysis, I find the defendants' evidence more compelling than that of the plaintiff in relation to the issue of ownership of the disputed land. Thus, the first issue has been answered in favour of the defendants.

Having answered the first issue in a negative, the second issue ***whether the defendants trespassed the disputed land*** and the ***third issue in respect of reliefs entitled to the parties*** automatically collapse.

Finally, based on the evidence of both parties as scrutinized above, this Court is satisfied that the plaintiff failed to prove his case on balance of

probabilities. Consequently, I dismiss this case accordingly. No order as to costs.

It is so ordered.

Dated and delivered at Moshi this 21st day of April,2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

21/04/2023