

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]  
AT ARUSHA

LAND CASE NO. 31 OF 2021

DOMINIC NICO MAGETA ..... PLAINTIFF

Versus

YAKOBO ISAYA ..... 1<sup>ST</sup> DEFENDANT

FRANCIS GETALA ..... 2<sup>ND</sup> DEFENDANT

JULIANA MARISELI ..... 3<sup>RD</sup> DEFENDANT

SANGAIWE VILLAGE COUNCIL ..... 4<sup>TH</sup> DEFENDANT

THE DISTRICT EXECUTIVE DIRECTOR

OF BABATI DISTRICT COUNCIL ..... 5<sup>TH</sup> DEFENDANT

THE ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT

JUDGMENT

*19<sup>th</sup> July & 1<sup>st</sup> September 2023*

Masara, J

**1.0 INTRODUCTION**

The Plaintiff, **Dominic Nico Mageta**, filed this suit against the Defendants jointly and severally seeking for the following orders:

- a) That the 1<sup>st</sup> Defendant's act of trespassing into his land is unjustified and unlawful;
- b) That the 1<sup>st</sup> Defendant, his agents, workmen or any other person acting under the Defendant's instruction be restrained;
- c) That the Plaintiff is the legal and lawful owner of the suit property;

d) Costs of the suit; and

e) Any other relief that the Court deems fit to grant.

As it will be apparent in this judgment, although the Defendants are jointly sued, the claims are essentially against the 1<sup>st</sup> Defendant. The Plaintiff's claim against the 1<sup>st</sup> Defendant is trespass on his parcel of land located at Gembo hamlet, Sangaiwe Village, Mwada Ward within Babati District, measuring 54 paces width by 70 paces length ("the suit land"). The suit land is described as the parcel of land bordering: Raymond Mareja to the north; Laurent Marcel Mareja to the South; Babati-Arusha Road to the East and Village land to the West.

The Plaintiff was not the original owner of the suit land; he purchased it from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 4<sup>th</sup> Defendant was sued as the entity which allocated the suit land to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on diverse occasions. The 5<sup>th</sup> and 6<sup>th</sup> Defendants were sued as necessary parties in suits involving the government.

In his written statement of defence, the 1<sup>st</sup> Defendant disputed the claims put forth by the Plaintiff. He stated that the suit land is part of his lawfully acquired land measuring three acres and that it was allocated to him by the 4<sup>th</sup> Defendant in 1998, after he made a formal application. He insisted

that he has been in peaceful occupation and use of the land for over fifteen years, uninterrupted, until in 2014 when the dispute arose.

On the other hand, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their joint written statement of defence supported the Plaintiff's claim. They stated that they were allocated one acre of land each by the 4<sup>th</sup> Defendant in 2002. They sold their respective pieces of land to the Plaintiff, but the 1<sup>st</sup> Defendant trespassed in the suit land claiming to be the lawful owner. They disputed the assertion by the 1<sup>st</sup> Defendant stating that there has never been allocation of land in 1998 by the 4<sup>th</sup> Defendant.

The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants filed joint statement of defence admitting some of the facts raised by the Plaintiff in the plaint. They contended that the Plaintiff has no claim against the 4<sup>th</sup> Defendant as there has not been point in time when the 4<sup>th</sup> Defendant invaded and trespassed in the Plaintiff's land. They asserted that the 4<sup>th</sup> Defendant allocated the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 2002, disputing that there has never been allocation of land to the 1<sup>st</sup> Defendant in 1998. They prayed for declaration that the suit land is the property of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

At the hearing of the suit, the Plaintiff appeared in Court in person, unrepresented. The 1<sup>st</sup> Defendant was represented by Mr Anord Tarimo, learned advocate. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants appeared in person

unrepresented; while the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants were represented by Mr Mkama Musalama, learned State Attorney. At the end of the hearing, the Plaintiff and counsel for the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants filed written submissions in support of their respective positions.

## **2.0 THE PLAINTIFF'S CASE**

The Plaintiff (PW1) informed the Court that in 2011 he purchased a piece of land measuring two acres (70 paces by 140 paces) located at Gembo hamlet, Sangaiwe village, Mwada ward, Babati District. He bought the land from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The sale agreements dated 02/10/2010 and 21/03/2011 were admitted as exhibits P.1 and P.2 respectively. In 2012, the Plaintiff found out that part of the land he had purchased, measuring 54 paces by 70 paces, had been trespassed by the 1<sup>st</sup> Defendant by cultivating it. After tracing him, he promised to stop trespassing after harvesting his crops. Unfortunately, the 1<sup>st</sup> Defendant did not respect his promise; he continued preparing the suit land for next season's farming. When summoned by the Plaintiff, he informed him that the land was his property and that he was allocated the same by the 4<sup>th</sup> Defendant in 1998.

The Plaintiff, seeing that the 1<sup>st</sup> Defendant was defiant, he filed a suit against the 1<sup>st</sup> Defendant in Mwada Ward Tribunal for trespass into the

suit land. The 1<sup>st</sup> Defendant was declared the lawful owner of the suit land by the ward tribunal. The Plaintiff appealed at the District Land and Housing Tribunal for Babati. The district tribunal nullified the proceedings and the decision of the ward tribunal for non-joinder of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. That decision prompted the Plaintiff to lodge a 90 days' notice in order to comply with rules governing suits against the Government. After that period, the Plaintiff filed this suit before this Court.

To support his evidence, the Plaintiff summoned two witnesses. Stella Thomas (PW2) testified that she was one of the members of the Sangaiwe village council who participated in the allocation of the village land in 2002. That in that allocation each allocatee received an acre. She accounted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were among the allocatees of the land. That, the procedure was for two people to receive a piece of land measuring 70 paces width by 140 paces long. After being given land, the allocatees paid TZS 1000 and were given receipts of acknowledgment. That, the land sold to PW1, is the one allocated to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. PW2 stated that prior to 2002, there were no owners of the land at the disputed area. The land was bushy.

Another witness was Gervas Nobert Mofulu (PW3). he accounted that between 2009-2014, he was the village chairman of Sangaiwe. As the

village chairman, he gathered from the village records that the land part of which constitutes the suit land belonged to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He then allowed the Plaintiff to purchase the same. That was after PW1 approached the village office at the time he intended to purchase the land. PW3 knew the dispute because he witnessed the sale of the pieces of land by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the Plaintiff. He also signed the sale agreements because at that time the Village Executive Officer was not around. He informed the Court that the land sold to the Plaintiff was allocated to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 2002. That, he witnessed the allocation and he was also a beneficiary of the allocations. It was his further account that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were jointly allocated 70 paces by 140 paces, which they sold to the plaintiff. According to PW2 and PW3, the 1<sup>st</sup> Defendant was not one of the allocatees of the 2002 allocations.

### **3. 0 THE DEFENDANTS CASE AND EVIDENCE**

#### **3.1 Case for the 1<sup>st</sup> Defendant**

The 1<sup>st</sup> Defendant summoned a total of four witnesses, including himself. The 1<sup>st</sup> Defendant, Yakobo Isaya (DW1), informed the Court that in July 1998, he wrote a letter to Sangaiwe village authorities, requesting for farming land. In October, 1998, he was allocated three acres of land

through a letter dated 10/10/1998, which was admitted as exhibit DE.1. The land allocated to him had the following demarcations: In the north, it bordered fruit tree, in the south it bordered an open space, in the east it bordered the Plaintiff and, in the west, it bordered a canal (mfereji wa serikali). That, the suit land measuring 54×70 paces, was wrongly sold to the Plaintiff by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. According to DW1, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were allocated land measuring 35 paces by 100 paces each. DW1 added that he has been using the suit land for agricultural purposes since 1998 to present. It was his further evidence that Yakobo and Jacobo are both his names.

Silvin Songa (DW2) and Gervas Welly (DW3) testified in support of the 1<sup>st</sup> defendant's case. That in 1998, they were the Village Executive Officer and village Chairman respectively. They confirmed to have received applications from the 1<sup>st</sup> Defendant, John Mashinda, Eliya Bombo and Gayandi Gasanoga, who were requesting to be allocated farming land. That after receiving the applications in July 1998, the same was referred to the village council and later to the village assembly. According to them, it was resolved that the land be allocated as requested. The duo testified that the land was allocated to those who applied in October 1998. That the 1<sup>st</sup> Defendant was allocated three acres of land. The land was

allocated by the committee of Finance, Economic Affairs and Planning of the village which was chaired by DW3. DW2 confirmed to have written exhibit D1 to the 1<sup>st</sup> Defendant

DW2, DW3 and Protas Norbert Mofulu (DW4) added that in 2002, there was allocation of plots along Babati-Arusha Road, whereby each village was allocated 35 paces by 140 paces. However, that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were allocated less land, that is 35 paces by 100 paces, due to the presence of the 1<sup>st</sup> Defendant in their west side. That, being the VEO of the village in 2002, DW4 was the secretary of the Finance Economic Affairs and Planning Committee which initiated the process of allocating the land to the villagers in 2002. DW4 also accounted that he was among those who got land measuring 35 paces by 100 paces, just like the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and they bordered each other. That, during allocation, where it was found that the land was in occupation, such occupation was confirmed. It was DW4's further account that the dispute was culminated by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's act of selling the land that did not belong to them.

### **3.2 Case for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (DW5 and DW6 respectively), admitted that they sold land measuring 70 paces by 140 paces to the



Plaintiff. They stated that the land sold to the Plaintiff was allocated to them by the village council in 2002. They informed the Court that the 1<sup>st</sup> Defendant trespassed to the disputed land claiming it to be his. According to DW6, the disputed land does not border the 1<sup>st</sup> Defendant because he does not have land there. This witness also confirmed that he had passed over ownership of the land to his son, Wilbroad Francis Getara, who appears as the seller in Exhibit P1. That the said Wilbroad has since passed on and that he was sued because he is the one who appears in the records of the village allocatees and the father of the seller. He also witnessed and signed Exhibit P1.

### **3.3 Case for the 4<sup>th</sup> to 6<sup>th</sup> Defendants**

Two witnesses testified for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants. DW7 informed the Court that he is the VEO of Sangaiwe village since 2020. He confirmed that there was land allocation of 2002, whose records he obtained from the office. The allocation of land was made by the village council and was authorized by the village assembly. The minutes of the village council and those of the village assembly were admitted as exhibits DE.2 and DE.3 respectively. That each villager who was allocated land, had to pay TZS 1000/= which was registered in an exercise book (exhibit DE.4). That each allocatee received an acre as per the records. There was no record

of any allocatee receiving less than an acre. The allocation was also registered in exhibit DE.4, the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants appearing in the third page. DW8 testified that he was the village chairman of Sangaiwe village from 1999 to 2004. In 2002, the village resolved to allocate land to its villagers whereby each villager was given 35 paces by 140 paces. That, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants received the same size of land which they later sold to the Plaintiff.

#### **4.0 ISSUES**

The following issues for determination were framed:

- a) Who is the lawful owner of the suit land;*
- b) Whether the 1<sup>st</sup> Defendant is the trespasser to the suit land; and*
- c) To what reliefs are the parties entitled to.*

In an attempt to have the above issues decided in his favour, the Plaintiff summoned three witnesses whose evidence I have summarised above. He tendered three exhibits; namely, Sale Agreement between the 2<sup>nd</sup> Defendant and the Plaintiff dated 02/09/2010 (Exhibit P1), Sale Agreement between the 3<sup>rd</sup> Defendant and the Plaintiff dated 21/03/2011 (Exhibit P2) and notice to sue the Government dated 15/04/2020 (Exhibit P3). The 1<sup>st</sup> Defendant summoned four witnesses; The 2<sup>nd</sup> Defendant testified as DW5 and the 3<sup>rd</sup> Defendant testified as the DW6. The 4<sup>th</sup>, 5<sup>th</sup>

and 6<sup>th</sup> Defendants summoned two witnesses. The defence evidence is as per the above narration. Four exhibits were tendered by the defence side; namely, Letter from Sangaiwe village, dated 10/10/1998 (exhibit DE.1), Minutes of the village council meeting dated 25/03/2002 (exhibit DE.4), Minutes of the meeting of the Village Assembly dated 28/03/2002 (exhibit DE.3) and an exercise book titled "Ushuru wa Viwanja-Ugawaji wa barabarani Sangaiwe- Barabara Kuu" (Exhibit DE.4).

#### **4.1 Who is the lawful owner of the suit land**

In his written final submission in support of this issue, the Plaintiff made reference to the testimonies of PW1, PW2, PW3, DW4, DW5, DW6 and DW7 who testified that the Plaintiff purchased a piece of land measuring 70 paces wide by 140 paces long from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 02/09/2010 and 21/03/2011 (Exhibits P1 and P2) respectively. He added that the record is supported by exhibits D2, D3 and D4, which clearly showed that the suit land was allocated to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He faulted the evidence by the 1<sup>st</sup> Defendant stating that there was no evidence proving that the suit land was allocated to him in 1998. That Exhibit D1 allegedly issued by the 4<sup>th</sup> Defendant as proof of allocation of the land to the 1<sup>st</sup> Defendant cannot act as proof since it is not supported by minutes of the village council or minutes of the village assembly. He

made reference to section 8(5) of the Village Land Act, Cap. 114 [R.E 2019] (hereinafter “the VILA”), which bestow upon the village council powers to allocate land subject to confirmation by the village assembly. In his view, the Plaintiff proved the case on the balance of probabilities, deserving the reliefs claimed in the plaint.

On his part, Mr Tarimo denounced exhibit P1 stating that it differed with the Plaintiff’s testimony because in that exhibit, the vendor of the land is Wilbroad Francis Getala and not the 2<sup>nd</sup> Defendant. That, the said Wilbroad Francis Getala was not summoned in court to testify and no reasons were advanced. In his view, the vendor appearing in the sale agreement was a material witness who ought to have been called to testify. To bolster his stance, he relied on the following reported decisions:

**Aziz Abdallah vs Republic [1991] T.L.R 71** and **Hemed Said vs Mohamed Mbilu [1984] TLR 113.**

Mr Tarimo further submitted that the evidence of PW2 and PW3 did not support the evidence of the Plaintiff because PW2 said that she knew nothing about the sale agreements. She equally testified that in the 2002 allocation, they were not given any document whereas PW3 testified that it was Wilbroad Francis Getala who sold the land to the Plaintiff and not the 2<sup>nd</sup> Defendant. The learned counsel maintained that the Plaintiff has

failed to prove his case as per section 1.10 of the Evidence Act, Cap 6 [R.E 2022] (hereinafter TEA).

In support of the 1<sup>st</sup> Defendant's case, Mr Tarimo was of the view that the evidence of DW1 that he was allocated the suit land in 1998 was corroborated by DW2, who was the VEO of that particular time and DW3, the chairman of the village. He also referred to the evidence of DW4 who testified that he, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were allocated 35 paces by 100 paces. From the evidence of the defence, it was Mr Tarimo's argument that the suit land is the property of the 1<sup>st</sup> Defendant who has owned and occupied it since 1998 and that the allocation of 2002 did not rescind any previous allocations. By virtue of occupying and using the suit land for more than 14 years from 1998 to 2012 when the dispute arose, the 1<sup>st</sup> Defendant became the owner of the suit land by virtue of adverse possession, the learned advocate submitted. His assertion was backed up by the decision in **Shaban Nassoro vs Rajabu Simba [1967] HCD 233.**

Regarding the evidence of the 2<sup>nd</sup> Defendant, Mr Tarimo accounted that his evidence is unreliable and contradictory because he testified that he sold the suit land to the Plaintiff while exhibit P1 shows that it was his son who sold the suit land. Counsel for the 1<sup>st</sup> Defendant also faulted the

evidence of DW7 stating that he was not there in 1998 or 2002 when the two allocations took place. He also knew nothing about exhibits D2, D3 and D4 as he admitted that they were only signed by the chairman and VEO, with an implication that the meetings were attended by two people only. That, since exhibits D2, D3 and D4 were not signed by all members who attended, it was Mr Tarimo's contention that the allocation of 2002 was a nullity, with the effect of nullifying also the transactions carried out between the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

On his part, Mr Musalama supported the Plaintiff's version stating that the evidence of PW2, PW3, DW4, DW5, DW6, DW7 and DW8 coupled with exhibits D2, D3 and D4 proved that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were allocated pieces of land measuring 35 paces wide by 140 paces long, by the 4<sup>th</sup> Defendant in 2002. Further their evidence is supported by exhibits P1 and P2 that they sold their pieces of land to the Plaintiff on 02/09/2010 and 21/03/2011 respectively.

Mr Musalama opposed the evidence by DW1 that he was allocated the suit land in 1998. He averred that such allocation never existed as there is no evidence that it was done by competent authorities responsible for allocating village land referring. That for any such allocation to be lawful it must be supported by a decision of the village council and village

assembly. He made reference to section 8(5) of the VILA and section 142(1) of the Local Government (District Authorities) Act, Cap. 287 [R.E 2002]. He also made reference to the following cases in support of his argument: **Methusela Paul Nyangaswa vs Christopher Mbote Nyirabu [1985] TLR 103** and **Udanghwenga Bayan and 16 Others vs Halmashauri ya Kijiji cha Vilima Vitatu and Another, Civil Appeal No. 77 of 2012** (unreported).

Regarding exhibit DE1, Mr Musalama was of the view that the same has no addressee and that it referred to Jacob and not Yakobo. That those are two distinct names. The learned State Attorney insisted that it was DW1's duty to prove that he was allocated the suit land in 1998 in consonance with section 110 of the TEA. The evidence regarding allocation of the land to the 1<sup>st</sup> Defendant was discounted by Mr Musalama for the reason that there were contradictions between the evidence adduced by DW1's witnesses in respect of the size of the land allocated to him and what is contained in exhibit D1. While the evidence referred to three acres, exhibit D1 showed he was allocated 3½ acres. In the learned State Attorney's view, the evidence is contradictory, calling upon the Court to discard it. He thus urged the Court to find and hold that the Plaintiff has proved the case to the required standard, justifying

declaration that he is the lawful owner of the suit land alongside the reliefs sought in the plaint.

Having outlined the evidence of each witness and the written submissions by the Plaintiff as well as by the two learned counsel in support of their positions, it behoves me to determine the first issue. There is overwhelming evidence to prove that the Plaintiff purchased a piece of land measuring 70 paces width by 140 paces length from the 2<sup>nd</sup> or his son and 3<sup>rd</sup> Defendants. The sale was done between 2010 and 2011. The sale agreements to that effect were tendered and admitted as exhibits P1 and P2.

In his account, the Plaintiff stated that he bought the suit land from Francis Getala (2<sup>nd</sup> Defendant) and Juliana Marcel (3<sup>rd</sup> Defendant). When cross examined by Mr Tarimo on the name of the vendor in exhibit P1, PW1 insisted that the name appearing in exhibit P1 as Wilbroad Francis Getala is the same person as Francis Getala. On the other hand, Gervas Nobert Mofulu (PW3) gave another version regarding the seller of the suit land. He certainly admitted that he witnessed the sale as the village chairman and that the land was given to Francis Getala, but the seller of the same to PW1 was Wilbroad Francis, as Francis had given the land to his son who was sick. When he was re-examined, he maintained that the



seller (Wilbroad Francis Gitala), later died. In his testimony, the 2<sup>nd</sup> Defendant who testified as DW5 accounted that he is being sued due to the fact that he sold his land to the Plaintiff. He further accounted that after the land was allocated to him in 2002, he gave it to his son in 2009 who in turn sold it to the Plaintiff. He added that he is sued as his son died and the name appearing in the allocation is his name.

Hues and cries were made regarding who actually sold the piece of land to the Plaintiff. Counsel for the 1<sup>st</sup> Defendant invited me to hold that the Plaintiff's purchase of land from the 2<sup>nd</sup> Defendant was not proven as the seller was not the 2<sup>nd</sup> Defendant as per Exhibit P1. I feel reluctant to bulge to this invitation. I have no reasons to doubt the sincerity exhibited by the 2<sup>nd</sup> Defendant regarding who was the owner of the land sold to the Plaintiff. The 2<sup>nd</sup> Defendant confirmed to have given the piece of land to his son, Wilbroad, as he was sickly. No documentation was made as it was a mere gift from a father to his son. When the said son died, as stated in evidence, the recourse by the Plaintiff was to sue the person whose name appeared in the records of allocations. In addition, the name of Francis Gitala appears in the Sale Agreement. He witnessed the sell. Thus, I do not agree with Mr Tarimo that the Plaintiff did not prove that he bought the land from the 2<sup>nd</sup> Defendant. To the contrary, there was

overwhelming evidence not only from the Plaintiff's side but from the Defendants, including the 1<sup>st</sup> Defendant himself, and his witnesses, that the Plaintiff purchased the pieces of land originally allocated to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. This evidence gets further credence from the 4<sup>th</sup> Defendant's records and evidence. I thus hold that the Plaintiff's purchase of the land, including the suit land was proved to the hilt.

Next for consideration is whether there was allocation of land by the 4<sup>th</sup> Defendant to the 1<sup>st</sup> Defendant in 1998. In his evidence, the 1<sup>st</sup> Defendant informed the Court that he wrote a letter to the village authorities requesting for farming land. He added that his request was considered and was given a response through a letter dated 10/10/1998 (exhibit DE1). According to Exhibit DE1, he was allocated land measuring 1½ acres width by 2 acres length. He added that he started using the land for farming since December 1998 to present. His evidence was supported by the evidence by Silvin Songa (DW2) and Gervas Welly (DW3) who were the VEO and chairman of Sangaiwe village respectively. DW2 was the VEO from 1997 to 1999 while DW3 was the chairman from 1993 to 1999. DW2 and DW3 admitted receipt of the letter from some villagers including the 1<sup>st</sup> Defendant, Gayan Kasanoga and John Mashinde, requesting for farming land. According to them, they convened a village council meeting

and deliberated the requests. That the applications were referred to the Village General Assembly which discussed the requests and granted those who requested the land as per their requests. The duo accounted that Jacob (DW1) was allocated three acres of land by the Financial, Planning and Economic committee, which was chaired by DW3 and DW2 was the secretary. DW2 admitted to have signed exhibit DE1, which was given to the 1<sup>st</sup> Defendant as evidence acknowledging the allocation of land.

The above piece of evidence was highly disputed by the Plaintiff and the other Defendants. DW7, the current VEO of the village where the suit land is located, informed the Court that there was no record whatsoever to support the 1998 allocation of land to the 1<sup>st</sup> Defendant and the other persons mentioned. DW7 and other witnesses confirmed that the 2002 allocation was the 1<sup>st</sup> to be done in the village land along the Babati – Arusha Road. They also confirmed that each of the villager received one acre (35 x 140 paces). As the custodian of the village records, I have no doubts that he was telling the truth. Furthermore, if there was such allocation, one cannot fathom reasons why the village government, district authority and the Attorney General would not confirm the same.

I am aware that the Plaintiff and Mr Musalama cited section 8(5) of the VILA to assert that the 1<sup>st</sup> Defendant's assertion was not supported by

Minutes. While I agree with them that village land could not be allocated without sanction of the Village Council and Village Assembly, I do not think the right provision for that purpose was section 8(5) of the VILA. The VILA was enacted in 1999 and it became operational on 1<sup>st</sup> May 2001. Therefore, VILA is inapplicable in this case, because it is not the law regarding allocation of village land at the time the 1<sup>st</sup> Defendant was allegedly allocated the land. Land matters at the time were regulated by Land Ordinance, Cap 113.

The above notwithstanding, allocation of village land was not a function of the Village Chairman and or Village Executive Officer. Section 141 of the Local Government (District Authorities) Act, 1982 bestowed a Village Assembly with supremacy over all matters of policy making in a village. It is the body that was responsible for the election of Village Council members. These two bodies are and were responsible for land allocation. The allocation of land to a villager could not be made without documentation. This can be evidenced from the evidence of DW2 who alleged to have convened meetings of the Village Council and Village Assembly to consider the applications made by the 1<sup>st</sup> Defendant and others. This witness stated that the motivation for granting land to the applicants was their cattle possession, a source of revenue for the village.

This evidence was augmented by that of the then village chairman, DW3. It is unfortunate that no records of the alleged meetings or letter of request was tendered. From the evidence, I do believe that such meetings never took place and no proper land allocation was made in 1998.

It may as well be true that DW2 and DW3 authorised the 1<sup>st</sup> Defendant to utilise three acres of land for farming as indicated in Exhibit DE1. The question is whether that land included the disputed land or whether the right to farm entailed perpetual ownership of the land in question.

It is gathered from the evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were allocated an acre each in 2002. That land borders the piece of land that the 1<sup>st</sup> Defendant was utilising for agricultural purposes. There is also evidence that since the allocation the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and subsequently the Plaintiff, did not undertake any developmental activities in the area. That could have been exploited by the 1<sup>st</sup> Defendant. He took advantage of it to encroach into the land allocated to the two Defendants. I say so because the evidence by DW4 that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants got lesser land was unsubstantiated. The minutes tendered showed that the 1<sup>st</sup> Defendant attended the allocation meeting which explained the size of land and the modus of allocation. The minutes do not show any

reservations as to the possible encroachment into the 1<sup>st</sup> Defendant's piece of land.

Furthermore, I share the reservations raised on the authenticity of Exhibit DE1. The same has no addressee. Secondly, one cannot use it to imply that it was a letter of allocation of the said piece of land to the 1<sup>st</sup> Defendant. By its own words, the 1<sup>st</sup> Defendant was allocated an area to enable him engage in agricultural activities. The letter does not make reference to the meeting that sanctioned the allocation, the date thereof and whether the allocatee was to use the land for a limited period of time pending other allocation processes. The first paragraph of Exhibit DE1 does not support the assertion made by the 1<sup>st</sup> Defendant that he made a formal application for the allocation of the land. It says that he went to the office to request for an area to conduct farming. In Kiswahili the said paragraph went as follows: *"Mtajwa hapo juu amefika hapo ofisini kuomba eneo la kulima pembeni mwa mzee Gayandi. Ofisi imempatia eneo la heka (3) tatu..."* For obvious reasons I will not make a determination whether the name "Jacobo" which appears in Exhibit DE1 is the same as "Yakobo".

From the wording of Exhibit DE1, it is difficult to ascertain that the grant was made by the authorities which the witnesses for the 1<sup>st</sup> Defendant

mentioned. Furthermore, when cross examined, DW2, Silvin Songa, confirmed that he signed the letter but it was written by another person in his absence. He also confirmed that the addressee of the letter was not known. One, therefore, cannot with certainty confirm the authenticity of the said exhibit nor can one take it to be a letter allocating the piece of land in question. In my founded view, the land remained to be unallocated until the proper allocation was made in 2002.

The 2002 allocation is evidenced by minutes of the village council (exhibit DE2), minutes of the village assembly (exhibit DE3) and the allocation exercise book (exhibit DE4). Counsel for the 1<sup>st</sup> Defendant questioned the authenticity of the said documents. In his view, every attendee ought to have signed them for them to be authentic. With respect, this argument is misplaced. In his testimony, the 1<sup>st</sup> Defendant acknowledged the 2002 allocation of land made by the Village Assembly. He also confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were allocated land in the said process. The minutes were signed by the Village Chairman and Village Executive Officer as is the norm. The author of the minutes, DW8, testified in Court and proved to have signed the same. DW7, the custodian of the minutes also testified in Court. I therefore harbour no doubts about the genuineness of the exhibits, DE2 and DE3.

From the evidence on record, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were allocated parcels of land measuring 35 paces by 140 paces each. The said parcels were later sold to the Plaintiff. The allegation that the two sold more land than what was allocated to them seems to me to be unproven. Further, the nuances made regarding farming on that land do not prove that the 1<sup>st</sup> Defendant is the rightful owner of that parcel of land. Mr Tarimo, in the alternative, invited me to hold that the 1<sup>st</sup> Defendant's long use of the said area should be a ground not to disturb his ownership. That he should be declared the owner on the grounds of adverse possession. With respect, this submission is not backed up with evidence.

Mr Tarimo failed to appreciate the circumstances that the defence of adverse possession can come into play. The Court of Appeal in the case of **Bhoke Kitang'ita vs Makulu Mahemba, Civil Appeal No. 222 of 2017** (unreported) had the opportunity to expound on the circumstances that the doctrine of adverse possession is invoked. It stated, *inter alia*:

*"It is a settled principle of law that a person who occupies someone's land without permission, and the property owner does not exercise his right to recover it within the time prescribed by law, such person (the adverse possessor) acquires ownership by adverse possession. The circumstances under which a person seeking to acquire title to land under that principle were aptly explicated in the case of the **Registered Trustees of Holy Spirit Sisters Tanzania v.***



**January Kamili Shayo and 136 Others, Civil Appeal No. 193 of 2016, CAT** (unreported) which quoted with approval the Kenyan case of **Mbira v. Gachuhi [2002] EA 137 (HCK)** in which again, reliance was made on the cases of **Moses v. Lovegrove [1952] 2 QB 533** and **Hughes v. Griffin [1969] 1 All ER 460**. It was held that:

*"[On] the whole, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following:*

*(a) **that there had been absence of possession by the true owner through abandonment;***

*(b) that the adverse possessor had been in actual possession of the piece of land;*

*(c) **that the adverse possessor had no colour of right to be there other than his entry and occupation;***

*(d) that the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*

*(e) that there was a sufficient animus to dispossess and an animus possidendi;*

*(f) that the statutory period, in this case twelve 12 years, had elapsed;*

*(g) that there had been no interruption to the adverse possession throughout the aforesaid statutory period; and*

*(h) **that the nature of the property was such that in the tight of the foregoing/adverse possession would result.***" (Emphasis added)

Clearly, and from his own evidence, the above outlined conditions are not met in the circumstances of the case at hand. The evidence shows that the land in question belonged to Sangaiwe village. It also suggests that his entry into the village land was sanctioned by the village leadership, the legality of it notwithstanding. He was also to use the land for a known purpose. Such evidence militates against any claim of adverse possession by the 1<sup>st</sup> Defendant.

From what I have endeavoured to explain, the first issue is determined in favour of the Plaintiff. He is the lawful owner of the suit land.

#### **4.2 Whether the 1<sup>st</sup> Defendant is the trespasser to the suit land**

Having determined the first issue in favour of the Plaintiff, the issue whether the 1<sup>st</sup> Defendant is a trespasser to the suit land goes without saying. Trespass into land entails an act of a person to enter into a land belonging to another without the authorisation of the owner. As the suit land forms part of the land belonging to the Plaintiff, the 1<sup>st</sup> Defendant's presence and continued utilisation of the suit land cannot be nothing more than trespass. He is therefore declared a trespasser into the suit land.

#### **4.3 To what reliefs are the parties entitled to**

In the plaint, the Plaintiff, in addition to seeking a declaration that he is a lawful owner of the suit land, he asked the court to restrain the 1<sup>st</sup>

Defendant, his agents, workmen or any other person acting under the Defendant's instruction from further trespass into the suit land. He also prayed for costs and any other reliefs as the Court may consider appropriate. Having proved his case on the required standards, it is only fair that his prayers be honoured. The evidence tendered shows that he has not done significant development in the land he purchased. He has therefore made no good case to deserve grant of damages, general or specific. In fact, he did not crave for them. The general rule regarding costs is that, costs follow the event unless for good cause the Court decides otherwise. I see no reason to depart from the general rule.

## **5.0 CONCLUSION**

In the event, and for the above stated reasons, the Plaintiff is declared the lawful owner of the suit land. The 1<sup>st</sup> Defendant is declared a trespasser to suit land and should give vacant possession forthwith. The 1<sup>st</sup> Defendant, his agents, workmen or any other person acting under his instructions are hereby restrained from further trespass into the suit land.

The 1<sup>st</sup> Defendant shall solely bear costs of this suit.



  
Y.B. Masara

**JUDGE**

1<sup>st</sup> September, 2023