

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

LAND CASE NO. 03 OF 2021

ATHUMANI MWILIMA1ST PLAINTIFF

**ISSA MOHAMED KIHAMBIKE (As the Administrator of the
Estate of the late OMARI JUMA MWILIMA)2ND PLAINTIFF**

**ABDUL ABUBAKARI MWILIMA (As the Administrator of the
Estate of the late ABUBAKARI MWILIMA)3RD PLAINTIFF**

V ERSUS

RAMADHANI TOFIKI 1ST DEFENDANT

SEIF KABILIGI 2ND DEFENDANT

OMARY RONGO 3RD DEFENDANT

YASSIN SWALEHE4TH DEFENDANT

HAMISI FADHILI KISWANGA5TH DEFENDANT

MAZUNGWE VILLAGE COUNCIL6TH DEFENDANT

UVINZA DISTRICT COUNCIL7TH DEFENDANT

HON. ATTORNEY GENERAL8TH DEFENDANT

JUDGMENT

19/1/2023 & 17/2/2023

Mlacha, J

The plaintiffs Athumani Mwilima, Issa Mohamed Kihambike (as the Administrator of the Estate of the late Omari Juma Mwilima) and Abdul Abubakari Mwilima (as the Administrator of the Estate of the late Abubakari



Mwilima) filed a suit against Ramadhani Tofiki, Seif Kaniligi, Omari Rongo, Yassin Swalehe, Hamisi Fadhili Kiswaga, Mazungwe village Council, Uvinza District Council and the Honourable Attorney General seeking the following orders;

- i) That, the first, second, third, fourth and fifth defendants are trespassers at the suit land, Block 46, KIDEA farms, Uvinza District, Kigoma region.
- ii) That, the plaintiffs are legally entitled to be allocated the suit land measuring 294 acres at KIDEA Lugufu area (Kazuramimba village), Uvinza District, Kigoma region estimated to be worthy 17,640,000/=.
- iii) That, the 6th defendant be compelled to allocate the suit land to the plaintiffs and to process and issue certificates of occupancy to the plaintiffs as was previously agreed between the first plaintiff, the said deceased persons and the second defendant's predecessor (Kigoma District Council).
- iv) That, the 6th and 7th defendants be restrained permanently from re-allocating the suitland to some other people.
- v) Alternatively, the 7th defendant be ordered to pay compensation to the plaintiffs as shall be assessed by the court for breach of contract and for unlawful conversion of Tshs 3,800,000/= which was paid to the 7th defendants' predecessor (Kigoma district council) by the first plaintiff and the late Abubakari Mwilima and Athumani Mwilima.

- vi) Payment of interest at the Bank rate of 22% on the principal sum of Tshs 3,800,000/= from the date of filing the suit till the date of payment in full.
- vii) Payment of interest on the decretal sum at the court rate of 7% from the date of judgment till the date of judgment in full.
- viii) Costs of the suit and any other relief the court may deem fit.

The first, second, third, fourth and fifth defendants filed a joint written statement of defence and denied the claim. They put the plaintiffs to strict proof. The sixth, seventh and eighth defendants filed a joint defence and denied the claims. They stated that they have no dispute in conducting survey of KIDEA farms. They went on to state that the plaintiffs had a duty to protect the land against any trespassers before seeking survey or being given a right of occupancy from the 6th and 7th defendants. They said that, the sixth and seventh defendants cannot allocate the land to the plaintiffs before the dispute between the plaintiffs and said defendants is resolved. They went on to state that the plaintiffs had failed to make full payment making the allegation of breach of contract baseless. They agreed to receive Tshs 3,800,000/= for survey and demarcating the land but survey and demarcation could not be done after observing that there was a land dispute. They put the plaintiffs to strict proof of the allegation that the 6th defendant have unlawfully allocated the land to the first, second, third, fourth and fifth defendants.

Mr. Kabuguzi and Ms. Joyce Godfrey appeared for the plaintiffs, Dickson Makongo appeared for the first, second, third, fourth and fifth defendants while Mr. Arnold Simeo and Allan Shija appeared for the sixth, seventh and

eight defendants. With the assistance of counsel, the court framed the following issues.

1. Whether the plaintiffs are the lawful owners of the suit land.
2. Whether the defendants trespassed the suitland.
3. To what reliefs are the parties entitled to.

PW1 Samwel Pomele Mkumbugwa (66), a retired land surveyor told the court that he surveyed KIDEA farms in 1991. He put beacons on the grounds. He surveyed the land for KIDEA members who included Omari Mwilima, Abubakari Mwilima, Ramadhani Tawafiki and Omari Mwilima. He drew a map, exhibit P1. He described the suitland as farm No. 46. He could point it on the map. He went on to say that he submitted the names to the land officer for preparation of title deeds but is not aware of what happened there after.

PW2 Issa Mohamed Kehambike (48) told the court that he is the administrator of the estate of the late Omari Juma Mwilima. He tendered his letters of administration, exhibit P2. He told the court that farm No. 46 is property of the plaintiffs, Athumani Juma Mwilima, Omari Juma Mwilima and Abubakari Juma Mwilima. They are brothers from one father. He went on to say that the area was set aside for agricultural activities in 1991 under the Regional commissioner, Mr. Mzindakaya. It was in Kigoma district in those days. It was under Kigoma Development Association (KIDEA). They were given block No. 46 which has 294 acres. They started to plant cassava, Maize and beans. They also planted palm oil trees. There

are 400 palm oil trees now. One house was broken by unknown people but one is still there. It is built of blocks and iron sheets.

PW2 could locate farm No. 46 in the map, exhibit P2. He went on to say that the plaintiffs applied for a title deed through a letter which was replied. The letter was written by Omari Juma Mwilima alone because his brother, Abubakari was already dead. The land officer replied the letter saying the application had been allowed. He directed them to pay Tshs 11,692,926. The two letters were received marked exhibit P3 and P4 respectively. They paid Tshs 3,800,000/= on 1/7/2013 for survey and preparing the title deed. He said that they could pay the balance after being given the title. The receipt was received as exhibit P5.

PW2 proceeded to say that Omari Mwilima fell sick for 5 years. He died in the US in 2008. That was the first challenge. The second challenge was the split of the district to create a new district of Uvinza. Athumani Mwilima made a follow up at Kigoma district council and was directed to Uvinza district council. The staff of Uvinza district council could not trace the records. Abubakari died in 2003. He proceeded to say that when they wanted to develop the land they met resistance from the first, second, third, fourth and fifth defendants hence the dispute. They decided to file a notice of intension to sue the government, exhibit P6. He said that they have 400 palm oil trees, one avocado tree and seasonal crops like cassava and pigeon peas (Mbaazi). They have a house and two local wells. He said that the first to fifth defendants have no right on the land because it had already been allocated to the plaintiffs. He requested the court to declare



them trespassers in the land. The land should be declared property of the plaintiffs, he said.

PW3 Abdul Abubakari Mwilima (64) is the administrator of the estate of the late Abubakari Juma Mwilima. He tendered his letters of administration, exhibit P7. He said that the deceased was one of the three owners of the land, block 46 KIDEA area. The land was part of the general land under the central government, not village government. Some KIDEA members got title deed while others like the plaintiffs could not get. One of those who got title deeds are Fedha Rashid Songoro and Mwemba Abubakari who own farm No. 53. They got their title deed from the Land Commissioner, Dar es salaam.

On the reasons as to why the plaintiffs did not get the title deeds, he said that Abubakari Mwilima fell sick and died in 2003. Omari Mwilima made a follow up and got a letter of offer in 2013. This was exhibit P4. He said that Omari Mwilima fell sick and died. He died in the US. The council was split to two councils. When they made a follow up to the land, they saw trespassers on the land. Uvinza district council could not assist to evict them. They had to sue. He added that the balance of the money could not be paid because of sickness and death.

PW4 Athumani Juma Mwilima (85) told the court that farm No. 46, KIDEA Uvinza district belongs to him and his late brothers; Abubakari Mwilima and Omari Mwilima. They got the land in 1990. It was a bushland with animals. They got it from the government under the leadership of the Regional Commissioner, Mr. Mzindakaya. They took the land without any condition and cleared the bush. They planted palm oil trees, cashew nuts and

ordinary food stuffs. They asked for a title deed but could not get it. People invaded the land. He asked the court to evict the trespassers.

DW1 Ramadhani Rajabu (85) told the court that he was chairman of KIDEA for 20 years. He is not aware why he is sued. He went on to say that they received Mwilima and others who came from Dar es salaam in those days. They formed KIDEA with 150 people. They divided the land to the people in 1992. He went on to say that he knows the land which is alleged to be owned by Mwilima. They planted 10 palm oil trees in 1990's. He is not aware about the existence of houses. He said that Mwilima gave him permission to allow the people to cultivate on the land but the place which had palm oil trees was left intact. He said that the land was given to KIDEA which gave it to the people. He ended by saying that, the Omari was the then chairman while he was his deputy.

DW2 Yasini Salehe (63) told the court that he got the land from the village government in October 1996. His land is about 10 acres. There are maize and cassava plants there. He has orange and mango trees. He planted mango trees soon after being given the land. He does not know the plaintiffs. He saw them in recent years. He went on to say that he got the land from Mazungwe village government in 1996. The leaders were Ramadhani Tofiki, Sura Mbaya and Mr. Chadema. Ramadhani was the chairman. He did not have any document or minutes from the village. He is aware that the land was set aside for KIDEA members but denied to invade it. It was given to him by village leaders.

DW3 Khamisi Fadhili Kiswaga (62) is a peasant of Mazungwe village. He has 10 acres. He got the land from DW1 Ramadhani Teofiki and Mzee

Chadema. He used the land from 1997 up to 2021 without being disturbed. He went to say that someone came in 2021 and cut his cassava. He complained to the village government. They were summoned but could not come. He sued in court instead. He has mango trees, cashew nuts, orange trees and banana plants. He has sisal plants at the boundary. He claimed to be an owner under the principle of adverse possession.

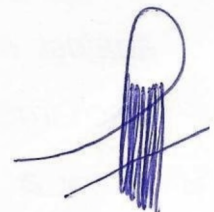
DW4 Manyama Makongo (43) is a land officer from Uvinza district council. He told the court that Mazungwe area was surveyed by the government and people were allowed to settle. The area was declared to be a village later. History shows that the survey was done in 1992. The plaintiffs came in his office claiming that the land is theirs. He demanded documents but they had none. He could not assist them because land ownership is more than mere words.

DW4 proceeded to say that he never happened to come across a title deed in the name of Athumani Mwilima, Omari Juma Mwilima and Abubakari Mwilima. He went on to say that they came with a receipt which shows that they had paid at Kigoma district council some amount. He told them that the area had already been declared a village so they had to go and talk to village leaders if they believed the land to be theirs. He went on to say that some people got their lands through KIDEA but is not sure if KIDEA is still alive. Some people have title deeds and the village was directed to respect them. He added that the plaintiffs are not owners of the suitland because they don't have any document of ownership. He went on to say that the receipt, exhibit P5, is a receipt for survey costs issued by Kigoma district council at a time when Uvinza district council had already

started to function as a council. He does not know why they went to Kigoma instead of Uvinza district council. He agreed to have seen the map, exhibit P1 in the office. He said that he is not aware of the owner of farm 46. He has no records showing that it was given to the plaintiffs. He proceeded to say that Mazungwe was declared a village in 2013.

DW5 Seifu Haruna Kabirigi (36) told the court that he has a piece of land in the suit land where he cultivates paddy (rice). He works on the land and goes home. He is not living there. He lives at Mazungwe village. He could not specify the size of his land. DW6 Omari Longo (56) is a resident of Mazungwe village. He has 8 acres in the suitland. He got it in 1996. It was a forest which he cleared. His land has 15 mango trees, 1 avocado tree, 1 lemon tree, 8 banana plants and 1 palm oil tree. Other things which are available on the land are maize, sweet potatoes and beans. He had no dispute for all the years until when the plaintiffs came last year and claimed to be the owners of the land. He added that the house they call theirs was built in October last year. They have planted palm oil trees which are still young. He agreed that the area is called KIDEA but is not aware if it was set aside for KIDEA people. He went on to say that he did not apply the land from anybody. He just cleared the bush and took it. Mzee Rama said 'limeni' meaning cultivate/use the land.

That marks the end of the summary of evidence adduced before the court. I will now move to discuss the issues. I will discuss the first and second issues together. I will start by showing the principles involved in the case; burden of proof, weight of evidence, credibility of witnesses and adverse possession.



Burden of proof was discussed in a number of cases including **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020, pages 12 and 14 where it was said as under:

*"... generally, in civil proceedings, **the burden of proof lies on the party who alleges anything in his favour.... the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.... 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.**" (Emphasis added)*

In **Godfrey Sayi v. Anna Siame (as Legal Personal Representative of the late Marry Mndolwa)**, Civil Appeal No. 114 of 2012 (unreported) the court took inspiration from the following statement by Lord Denning made in **Miller v. Minister of Pensions** [1937] 2 All. ER 372 at page 340 where he said as under:

*"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly **but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt.** This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. **It must carry a reasonable degree of probability, but not so high as***



required in criminal case. If the evidence is such that the tribunal can say. We think it is more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."

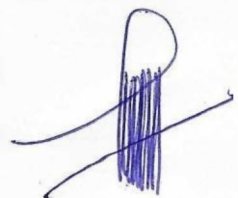
In **Hemedi Saidi V Mohamedi Mbilu** 1984 TLR 113. (HC-Tanga, the late Sisya, J) page 116 where it was said as under:

*"According to law **the person whose evidence is heavier than that of the other is the one who must win.** In this instance each party called two witnesses in addition to himself at the hearing of the case in the Court of first instance. In measuring the weight of evidence in such cases as the present one **it is not, however, the number of witnesses whom a party calls on his side which matters. It is the quality of the said evidence.** In this connection the evidence of a single witness may be a lot heavier than that of ten witnesses."*

The principle was restated by this court in **Jaspa Abraham v. Rubeni Kafuku**, (HC-Bukoba), Land Case Appeal No. 27 of 2020 (Mugetta J) page 4 where it was said thus:

*"I found that the measurement to be used here as properly used by the district tribunal is **who, between the parties, had given heavier evidence as regards to the ownership of the suit land,** as both parties to the suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win." (Emphasis added)*

See also **Said Duka v. Salima Saidi Malisen**, PC Criminal Appeal No. 4 of 2021 (HC- Mtwara, Muruke J) page 2.



Adverse possession was well discussed in a number of cases including In **Mbira v Gachuhi** (2002) 1 EA 137 it was held thus:

"A person seeking to acquire title to land by adverse possession had to prove:

(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 animopossidendi;

(f) that the statutory period, in this case twelve 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 light of the foregoing, adverse possession would result."

See also **Hassan Hole v. Keya Jumanne Ramadhani**, Civil Appeal No. 19 of 1992 (CAT) where it was held as follows:

"The Courts have been reluctant to disturb persons who have occupied land and developed it over a long period."

Having stated the principles, let us now look at the evidence to see the way they are fitting the situation at hand. My Look of the evidence shows that the following facts are accepted by both parties. i) That, the suit land is located in an area called KIDEA which is within the boundaries of Mazungwe village. ii) That, the first, second, third, fourth and fifth defendants occupy pieces of the land in the suit land described as farm No. 46 KIDEA area. iii) That, the plaintiffs were absent for some time and when they came back they saw the first, second, third, fourth, and fifth defendants in the land who refused to vacate. iv) That, the plaintiffs claim ownership of the land through allocation by the central government in the general land while the second, third, fourth and fifth defendants claim ownership through allocation from local leaders including the first defendant. v) the first defendant had no claim on the land. He was sued because he is the one who gave land to the second, third, fourth and fifth defendants something which he accepted.

To prove ownership of the land, the plaintiffs tendered the following exhibits. i) The map of the area, exhibit P1. It has no approval of the Director of Mapping and Surveys but PW1 said that he used it to survey the land and DW3, the land officer of Uvinza district, agreed to have seen it in his office. It appears that this is the document which was used to survey the land to create the farm blocks. Farm No. 46 is seen at the upper area,

on the road side. When we visited the suitland we saw that it is adjacent the main road, the uvinza – Kigoma road. ii) A letter dated 12/7/2004 written by Omari Juma Mwilima, exhibit P3 addressed to the Land officer, Kigoma district council. It is headed "*MAOMBI YA KUPATIWA HATI YA ARDHI YA KUDUMU*". It was making reference to the land at KIDEA Rugufu which is the suit land. iii) A letter from the Land officer of Kigoma district council, exhibit P4, dated 19/12/2012 addressed to Omari Mwilima. It is headed "*GHARAMA ZA KUPIMA NA KUTOA HATI SHAMBA LILILOKO KIDEA (LUGUFU)*". He was required to pay Tshs 11,692,926 as survey costs. iv) An ERV Receipt No. 46295558 dated 1/7/2013, exhibit P5. It is written "GHARAMA ZA UPIMAJI SHAMBA" with Tshs. 3,800,000/=.

There was no offer or title deed tendered as evidence. There is the map of the area, an application for a title deed and a response for subdivision giving the survey costs. There is also part payment. So strictly to say, there is no documentary evidence showing that the plaintiffs own the land. But, reading through, one can agree that there is evidence showing that the plaintiffs were given the land in 1990's as alleged only that they could not take steps to get the title deeds. There is also evidence that they abandoned the land for some years giving a chance to the second, third, fourth and fifth defendants to take part of the land. The fourth and fifth defendants said they have 10 acres each, the third defendant say he has 8 acres while second defendant was not sure of his size.

Reasons given by the plaintiffs to justify their absence were two; One, sickness and death of two of them. This was the main reason. Two, the division of Kigoma District Council to get two councils; Kigoma and uvinza.

The area was now under the authority of a new district council and village council. I don't find sickness and death of some plaintiffs as a valid reason because the length of time (1996 to 2021, 25 years) was just too big. They are also elderly people who were in a position to send their children to process the title deeds. The split of the council and change of status of land from general to village land might have caused some problems to them but they have no body to blame except themselves.

The second, third, fourth and fifth defendants have no any document of title. They got their land from the first defendant who had no authority to allocate land. The land being part of the general land could only be allocated by the central government. What was done by the first, second, third, fourth and fifth defendants in 1996 was thus a taking of the land without a colour of right which was done at the knowledge of the plaintiffs but without any resistance for 25 years. They cultivated the land and grew trees things which were against the interests of the plaintiffs but could not face any resistance for all the years. They are thus entitled to ownership of their respective pieces of land by adverse possession.

There is evidence that the plaintiffs have sufficient interest in the land were given the land in the 1990's. But there is evidence that part of it have already been invaded by people who have already acquired title by adverse possession. What now should be done? I think that the plaintiffs have a right to the land and can process a title deed in their favour but this should be limited to the land, other than the land now in occupation of the second, third, fourth and fifth defendants. They will take the land but the rights of the second, third, fourth and fifth respondents remain protected.

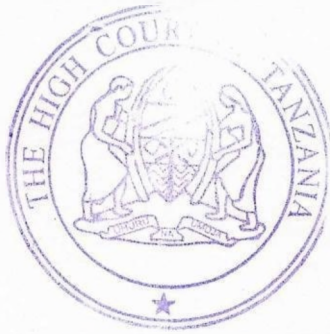
This case now ends with the following orders;

1. The plaintiffs are declared lawful owners of farm No.46 KIDEA area, Mazungwe Village, Uvinza district less the land which is currently occupied by the second, third, fourth and fifth defendants.
2. The second, third, fourth and fifth defendants are declared lawful owners of their respective pieces of land within farm No.46, KIDEA area, Mazungwe Village, Uvinza district under adverse possession as specified below;
 - a) Second defendant 5 acres.
 - b) Third defendant 8 acres.
 - c) Fourth defendant 10 acres.
 - d) Fifth defendants 10 acres.
3. The seventh defendant is directed to subdivide farm No. 46, at the cost of the parties, to ensure that each of the parties is settled in the area as directed in No.1 and 2 above and process a title deed accordingly.
4. If there is another person in the land, who was aware of the case but could not take trouble to join in the case, should not be heard to complain.
5. No order as to costs.

The suit is allowed partly. It is ordered so.

Dated at Kigoma this 17th day of February 2023.







L.M. Mlacha

Judge

17/2/2023

Court: Judgment delivered. Right of Appeal Explained.




L.M. Mlacha

Judge

17/2/2023

ORIGINAL