

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA  
MOROGORO SUB-REGISTRY  
[AT MOROGORO]

LAND CASE NO. 05 OF 2021

THOMAS BAUMBA NYARUSANDA.....PLAINTIFF

VERSUS

MOROGORO MUNICIPAL COUNCIL .....1<sup>ST</sup> DEFENDANT

M/S EDUCARE SECONDARY SCHOOL MOROGORO.....2<sup>ND</sup> DEFENDANT

ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT

JUDGEMENT

07/03/2024 & 28/03/2024

**KINYAKA, J.:**

The Plaintiff sued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally for:

- (a) A declaratory order that the plaintiff is the lawful owner of the whole of plot No. 98, Block G-MD located Kihonda within Morogoro Municipality.
- (b) Forceful eviction of the 2<sup>nd</sup> defendant from the said premises.
- (c) An order for permanent injunction restraining the 2<sup>nd</sup> defendant and or their servants, hires, agents, assignees, or any persons acted on their behalf from trespassing onto the suit premises,



- (d) Monetary compensation for all the economic, psychological and other tortures and losses inflicted by the defendant to the plaintiff.
- (e) Costs of the suit be provided for
- (f) Any other reliefs(s) as the court deems fit and just to grant.

In the plaint, the plaintiff alleged that he was allocated Plot No. 98, Block G-D situated at Kihonda within Morogoro Municipality by the 1<sup>st</sup> defendant in 1998 which he duly developed. But later, on 29<sup>th</sup> December 2003, the 1<sup>st</sup> defendant issued a letter to the 2<sup>nd</sup> defendant accompanied by a map dated 20<sup>th</sup> November 1991 which was contrary to previous map dated 25<sup>th</sup> August 1992 in his possession. The plaintiff complained that the subsequent map divided his plot into two pieces.

On the other hand, the 1<sup>st</sup> and 3<sup>rd</sup> defendants as well as the 2<sup>nd</sup> defendant vehemently resisted the plaintiff's claims through their written statements of defence dated 20<sup>th</sup> January 2022 and 22<sup>th</sup> December 2021 respectively, hence subjecting the plaintiff into strict proof of the same on the required standards. On that basis, on 7<sup>th</sup> December 2022 when the suit came for final pre-trial settlement and scheduling conference, the following issues were agreed and recorded by the Court:



1. Whether plot No. 98, Block G, and plot 646 Block G. overlaps each other.
2. Whether there was trespass by the 2<sup>nd</sup> defendant to the Plot No 98, Block G.
3. What reliefs are the parties entitled to.

On the dates of hearing of the suit, the plaintiff enjoyed the services of Mr. Erick F. Chale, learned Advocate, and at times, together with Mr. Emmanuel Kimaro; the 1<sup>st</sup> and 3<sup>rd</sup> defendants enjoyed the services of Mr. Xavier Ndalahwa, Senior State Attorney, and Mr. Mzumbe Eliakim Machunda, learned State Attorney; and the 2<sup>nd</sup> defendant enjoyed the services of Mr. Tumaini Mfinanga, learned Advocate.

The plaintiff testified as PW1. He testified that he was a government employee at the Veterinary Department. As to how he came into possession of the land in dispute, PW1 informed the court that he and other employees were given an offer to obtain some plots whereby he was allocated Plot No. 98, Block G-MD situated at Kihonda Area within Morogoro Municipality on 28<sup>th</sup> September 1998 and thereafter obtained a building permit from the Director of Town Planning at the 1<sup>st</sup> defendant's office. Substantiating his testimony, he tendered both the offer and the building permit as exhibits

6

and the same were admitted in evidence as Exhibit PE. 1 and Exhibit PE. 2 respectively.

PW1 went on testifying that, later on he found an architect, one Hassan Hussein Mwaliko who drew the site plan which was approved and stamped with the seal of the Director of Town Planning on 14<sup>th</sup> March 1995. Describing the contents of the said site plan which was admitted in evidence as Exhibit PE.3, PW1 testified that the same contained his names as the owner and the names of the drawer of the sketch map as an expert, the dates, and scales of the drawing. He illustrated that the site plan showed the boundaries to the effect that at the southern side, there was an airport, at the north there was a road, at the west there was a primary school and at the east there was Plot No. 97 where according to the drawer of the site plan, there were 43 metres at the southern part, 24 metres at north, 45 metres at the east, and 56 meters at the west. He told the court that it was until in the year 2000 after he had shifted to his house built in Plot No. 98 when he received a letter of complaint regarding boundaries between him and the 2<sup>nd</sup> defendant.

As to the genesis of the dispute between him and the 2<sup>nd</sup> defendant, PW1 informed the court that, the same arose due to existence of two drawings

in respect of the same area where the one issued in 1991 showed there was a primary school and the other one issued in 1992 showed that his plot was divided into two, the other piece of the plot being allocated to the 2<sup>nd</sup> defendant meaning that the new map indicated that at the western part of his plot, his neighbour was no longer the primary school but the 2<sup>nd</sup> defendant.

In response, PW1 testified to have reported the matter to the street Chairperson and later on to the Commissioner for Lands where both the street chairperson and the commissioner of lands showed to him the drawings that divided his plot into two plots contrary to his original plot. He said, the Commissioner for Lands informed him that the 1991 drawing didn't exist but when he went to the Ministry of Lands he was shown both the 1991 and 1992 drawings and he was told that the 1992 drawing was the genuine one while as regard to that of 1991 they told him "*hiyo ilikuwa chafu*". He thereafter went to the 1<sup>st</sup> defendant's land officials and discussed over the matter.

On the difference between the two drawings, PW1 said that the 1991 drawing showed that he had built on the plot while that of 1992 which was according to him correct, and was recognized by the 1<sup>st</sup> defendant the

boundaries showed that at the south there were 43 metres, at west where there was primary school/the 2<sup>nd</sup> defendant there were 56 metres, in the north where there was a road, there were 24 metres, and at the east where there was Plot No. 97 there was 45 metres. Testifying on the 1991 drawing, he said the same indicates that at the north there was airport with 35.56 metres, on the western part there was a primary school/2<sup>nd</sup> defendant with 54.81metres, while at the northern part there is a road with 23.94. He complained that, the said road was dislocated hence prompting the 2<sup>nd</sup> defendant to build its wall which as a result blocked him at the front side of his house.

As to the actions he took in response of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' action, PW1 testified that, on 2<sup>nd</sup> June 2006 he decided to lodge a complaint to the 1<sup>st</sup> defendant's land dispute committee which was duly responded through the letter dated 8<sup>th</sup> February 2008 that was admitted as **Exhibit P4**. He contended that the directives in the letter were not implemented hence he referred his grievances to the 1<sup>st</sup> defendant's Town Planning office where he was issued with a letter from the office dated 11<sup>th</sup> August 2009 which was admitted in evidence as **Exhibit P5**. He contended that the directives in the said letter were also not implemented which hence he escalated his

complaints to the Ministry of land which was duly responded by the Ministry on 29<sup>th</sup> June 2017 and directed to the Municipal Director to fortify his assertion, PW1 tendered the said letter as exhibit which was admitted in evidence as Exhibit P6 and thereafter complained that the letter was not implemented prompting him to go back to the Ministry of land where he was advised to prefer a legal action upon issuing a 90 days' notice to sue the government. In the end he prayed for all reliefs as articulated in the plaint.

On being cross examined by Ms. Ambonisye, PW1 contended that the court did not receive any kind of drawing and that he had no an idea that the disputed piece of land was suspended from use. Responding to Advocate Mfinanga's questions, as to the time when he was allocated the plot as well as the size of the same, the witness testified that he was allocated his plot in 1988 but the same had had no square metres and that the beacon were intact and had never been uprooted. He elaborated that he was suing for invasion of his land where the invader, the 1<sup>st</sup> defendant exceeded the planted beacons by 7.4 metres on the western and eastern sides of his plot. He explained further, as a result of the invasion he built a fence wall between his plot and the 2<sup>nd</sup> defendant's but at the same time he admitted that the 2<sup>nd</sup> defendant had never complained of anything against him and further that

the place where the 2<sup>nd</sup> defendant built a wall is not his. He insisted that the beacons were wrongly placed in the disputed land and the boundaries and that the map of 1992 had no problem as it related to his plot.

In re-examination, PW1 testified that he built the fence wall at the side which he is bordering the 2<sup>nd</sup> defendant as that there was a dispute since 2002. He clarified that he found the beacon already planted when he was allocated the plot although he did not know who planted the same, but possibly in his view it was the Municipality who could have planted the beacons and told the court that he did not remember when the dispute arose. That marked the end of the plaintiff's case.

DW1, Imani Angolile Mlalila, Land Assistant Surveyor, testified for the 1<sup>st</sup> and 3<sup>rd</sup> defendants. He contended that the dispute was on drawings in respect of the disputed land which comprised of the town planning drawing and the survey planning. He testified that in the town planning drawing, the plaintiff's land was Plot No. 98, Block G, Kihonda Low Density (LD) while in the survey plan, it is Plot No. 695, Block G, Kihonda. He explained that the town planning which must be registered by the Ministry of Lands, covers vast area compared to survey plan and normally show different use of the specific land such as residence, sports, market, open space, schools, different

government departments, and so on. He explained further that if the town planning is not registered by the Ministry of Lands, it cannot be used to grant right of ownership to a person.

He stated that it was the Town Planning Drawing No. 10/160/183 which was admitted in evidence as Exhibit DE1 that made them survey Plot No. 98 Block G, Kihonda and that the same was registered on 25<sup>th</sup> August 1992. Upon referred to the same, he identified the boundaries of Plot No. 98 from the drawing that it was bordering Primary school, Airport, Street road and Plot No. 97.

He testified to have done a Plan Survey which was registered as Survey Plan No. 81594 for Plot No. 695 Block 'G' Kihonda admitted in evidence as **Exhibit DE2** showing the width and length of the Plot, the size of the Plot and any other information such as a building found on the plot, beacons, registered plan number, size and number of a plot, and heading that show the number of the plot. Upon asked to identify the plaintiff's plot in Exhibit DE2, DW1 pointed out the plaintiff's plot in Exhibit DE2 whose boundaries had four beacon marks BCD 23 and BCD 57; BDP 184 and BDP 185 and identified a building which was found during survey. He added that the Plot had 1447

square metres, low density with Plan Number B13 169/264 and registered plan number 81594.

He testified that the school plot was on the southern part of Plot No. 98, and informed the court that it is the Town Planning Drawing that gives rise to the Survey Plan which must be similar in shape. While admitting to have conducted Survey Plan on 16/07/2015, DW1 denied to have made any changes to the Town Planning Drawing and Survey Plan and contended that in Exhibit DE1, the use of the plots were duly shown. He informed the court that if any person applies for ownership over the plaintiff's plot, he will be granted the plot with 1447 sqms, Plot No. 695 Block 'G' Kihonda which had been surveyed. He stated that there was no any dispute or problem with regards to the land.

The witness testified to have received information from the plaintiff that directed 1<sup>st</sup> defendant's officials to define the boundaries of the Plot. In response, he went to the site with one Samson Titus Ndyuki sometimes in 2022 with tools and pointed out the boundaries where the beacons were as equal as shown in the Exhibit DE2. He told the court that what is in the Survey Plan was similar to what is on the ground at the site. He added that the plaintiff's claim that the 2<sup>nd</sup> defendant trespassed into his plot was

incorrect. He prayed the Court to proceed to make orders as there was no any dispute on the land.

On being cross examined, DW1 testified that the dispute began in 2022 after the plaintiff's complaint. On being asked to outline the procedure for one to own a land, he narrated that, the person applies for ownership of land to the Municipal Council who will send the letter of application to the Town Planning Office. After that the head of Planning Office will require confirmation such as all drawings, introduction letter, NIDA ID, payment of costs of opening file and so on. He testified not to remember exactly when the plaintiff was granted ownership of the disputed land and that before the year 2015, the plot of land was owned by the Plaintiff and he had an offer and not a certificate of title. He said that he was not aware if the plaintiff was given a certificate of title.

DW1 responded further that he did not recognize Exhibit P4 which was written in 2008 and that they went to the disputed land in 2022 when the suit was before the Court and that they did not deal with the dispute before it was referred to court. He admitted that the plaintiff complained of trespass of his land on the boundaries, however according to him it was not true that there was trespass. He pressed that it is the Town Planning

Department/Office within the Morogoro Municipal council which should be believed and informed the court that Exhibit P4 was written by the Director of Morogoro Municipal Council who conceded that there was a dispute.

He explained that the site plan is the drawing showing the land measurements which obtains its validity upon being registered by the Ministry of Lands, and that the relationship between Site Plan and Plot No. 98 is that in the site plan, there are measurements of a particular plot of land. He admitted to be aware of the fact that Plot No. 98 has a site plan which show its measurements.

DW1 testified that Exhibit PE3 was a building drawing/plan with measurements of 43, 45, 56 and 24 on both sides and explained that there is a relationship when a person is granted ownership of land and site plan to the effect that the building permit should not exceed the size of the land. In the present matter, He denied to have known as to whether the permit was granted by the Municipal Engineer. According to him it was the plaintiff who prepared the drawing before he was granted the building permit and that the contentious issue was on boundaries not building drawings or permit. He informed the court that in order for building permit to be granted, the 1<sup>st</sup> defendant must confirm the size of the land.

He testified that Exhibit PE6 showed that the Plaintiff admitted that Exhibit DE1 was the drawing used to survey his plot of land however he was not sure if the letter was implemented. He confirmed to have stated that the plaintiff owned the property before the survey but he did not know if the plaintiff was allowed to build on the disputed land before the survey. He testified to have been employed in 2015 in another office and was transferred to the 1<sup>st</sup> defendant in 2019 and that what he knows is that the dispute was reported in 2022 at the 1<sup>st</sup> defendant's office. He substantiated that the Commissioner for Lands directed the Morogoro Municipal Council director to resolve the dispute in the letter issued in 2017 and that on their part they dealt with the same in both in 2017 and in 2022. He said that he was not sure if there was evidence tendered in court to show how they dealt with the directions, and admitted not to have submit any proof to such effect.

Testifying on the size of land as shown in Exhibit DE1 and DE2, DW1 said the size of Plot No. 98 was shown in Exhibit DE2, and the Survey Plan whose size was the same in Exhibits DE1 and DE2 which was surveyed and measured 1447 sqms. He elaborated that, in Exhibit DE1, the size is not shown which was normal while in Exhibit DE2 it is written 'amendments made by Peragua on 23/06/2015' which showed changes on Plot Numbers

from 98 to 695. He told the Court that there were other plots numbers before they surveyed, and after the survey, the plaintiff's plot was given number 695 which if the Plaintiff wants to pay for the same, he will have to pay on Plot No. 695.

On Exhibit PE4, DW1 testified that the same was signed by the Director of Municipal Council directing resolution of the dispute over Plot No. 98 and that there were various directives from the Director of Municipal Council and Ministry of Lands to resolve the dispute to no avail until the plaintiff preferred the present suit in this court.

In re-examination, DW1 testified on Exhibit PE4 that there were no measurements of the Plot in Exhibit PE4. On Exhibit PE3, he contended that it is Hussein H. Mwaliko of S.L.P 166, Morogoro who prepared the letter but he did not describe his title. On Exhibit PE6, he testified that the letter was from Ministry of Lands with the allegations that they surveyed and divided the land owned by the plaintiff which was not true. He went on testifying that the size and appearance of the plaintiff's plot shown in Exhibit DE1 is similar to the one shown in Exhibit DE2. He contended that the one who implements the directives from the Ministry of Lands such as Exhibit PE3 and

PE4 are Land Surveyors, Land Officers and Town Planning Officers and insisted that the plaintiff's claims were dealt with and the dispute ended.

On being examined by the Court, DW1 testified that plaintiff was owning the land before they did the survey in 2015 and that he was the one who applied for survey of his plot after his discontents.

On his part DW2, Alfred Michael Bomani, Managing Director of the 2<sup>nd</sup> Defendant, testified to have been the Managing Director of the 2<sup>nd</sup> defendant Elicare Company Limited since 1999. He said the 2<sup>nd</sup> Defendant was built on a plot that was entrusted to him by Morogoro Municipal Council, but the plot is in the name of Elicare Company Limited. He contended to have a proof of ownership, a certificate of title and admitted to have found the plaintiff in the vicinity who welcomed them and was he was keeping and looking after their construction materials.

He said that, they had never had any quarrel or dispute with PW1 with whom they were bordered by a fence which had a mixture of burnt clay bricks wall and on the other part there are trees and a wired fence which was built by the plaintiff. He informed the court that they were there when the plaintiff was constructing the wall and no any dispute arose in the course of building

the wall and that the plaintiff did not say anything about the boundaries. He admitted to have received a letter addressed to the Municipal Director of the 1<sup>st</sup> defendant written by the plaintiff which was admitted in evidence as **Exhibit DE3.**

He testified that he didn't know the boundaries of the plot bordering the plaintiff and that they never bothered the plaintiff on the wall he constructed as it was constructed at the right place and boundary. He testified further that, the 1<sup>st</sup> defendant once went to the plot to confirm on the boundaries and noted that there were no encroachments on the plots or boundaries. He prayed for dismissal of the suit with costs as it took 9 years.

On being cross examined, DW2 stated that the 1<sup>st</sup> defendant's officers went to confirm the boundaries according to their drawings only once in 2003. He testified that the 2<sup>nd</sup> defendant's plot was not surveyed and that he did not know that the plaintiff was given a right of occupancy. He pleaded that the plaintiff was given title as he thought ownership is through a right of occupancy, and one cannot be given land without right of occupancy. He told the court that he wrote a letter to the 1<sup>st</sup> defendant complaining about the boundaries in 2003 that their plot was deducted by the plaintiff, and there were noises from the plaintiff's house. DW2 continued telling the court

that there was no dispute before 2003 and that he wrote the letter because of the plaintiff's complaints. He said, the dispute was resolved although he did not tender any document to prove resolution of the said dispute over boundaries. He added that the plaintiff never built a house in their plot and that he wrote a letter to the 1<sup>st</sup> defendant which was responded by the same and that the letter was attached with a drawing. He denied the allegations that he did not tender the letter in evidence to hide the truth. The letter was admitted in evidence as **Exhibit DE4**.

He stated that he complained of the invasion of their plot by other neighbours and not the plaintiff and that the drawing attached to Exhibit DE4 show Plot No. 98 Block G where there is an open space with no number between Plot No. 98 and the 2<sup>nd</sup> Defendant which is no longer there. He denied that the open space was the one the plaintiff was complaining about in the suit and that he did not know if the open space in Exhibit DE4 is their plot or the plaintiff's. On Exhibit DE1, DW2 testified that the plot on the drawing is written primary school but he could not explain on the same as he was not a surveyor and admitted that there are two drawings which are different.

In re-examination, he said the Town Planning Drawing and Survey Plan were different and insisted that the dispute with which he wrote a letter to the 1<sup>st</sup> defendant ended and is no longer there. He explained that between the 2<sup>nd</sup> defendant and the plaintiff they are bordered by a fence and that there is no open space between them. He insisted that there is no dispute over title before the Court, and that the invasion of the plaintiff is no longer there as the 1<sup>st</sup> defendant's officers resolved the same. On Exhibit DE4, DW2 testified that the drawing showing the 2<sup>nd</sup> defendant is correct and has not interfered or touched the plaintiff's plot and that the 1<sup>st</sup> defendant served the letter and the drawing upon the 2<sup>nd</sup> defendant. At the end, he denied of being aware of any objection from the plaintiff on Exhibit DE4.

Upon closure of the evidence of the parties, the Court found that the evidence established that there were two different drawings which created uncertainties as to the actual appearance of the disputed land including the existence of open space in some drawing. There was evidence to suggest that the boundaries were unclear and the plaintiff's plot was reduced in size by the existing drawings. It was on the basis of such observation, and guided by the authority in the case **of Avith Thadeus Massawe Vs Isdory Assenga**, Civil Appeal No 7 of 2017 (Unreported), the court found it

necessary to visit the *locus in quo* on 7<sup>th</sup> March 2024 in order to satisfy itself on the exact area in dispute between parties herein.

The evidence of PW1, DW1 and DW2 at the locus visit were similar to the evidence they testified in their previous evidence. The Court observed that the bone of contention is on the alleged reduction of the size of the land on the western part of the plaintiff's land where the plaintiff borders the 2<sup>nd</sup> defendant by a width of 7.44 metres and length of 5metres. This, according to the plaintiff, did not match the actual shape and measurements of his plot as per previous measurements, that is, the width of 43 metres and the length of 56 metres. The court observed that the previous beacon was shifted from its original place where PW1 found them when he was granted Plot No. 98 by 25cms (equivalent to 0.025 metres) from where the new beacon was rooted. The changes added the width of the plaintiff's land by 0.025 metres on the southern part of the plot.

In determining the dispute, I will be guided by a principle of law applicable in determination of civil cases as enshrined under section 110 of the Evidence Act (Cap 6 R.E. 2002], that he who alleges anything to be in his favour has a legal burden of proving the same. The said section reads;

to

*"110 (1) Whoever desires any court to give Judgement 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."*

With the above provision in mind, I will evaluate both oral and documentary evidence guided by the issues agreed and recorded by Court as reproduced earlier on above. Due to the nature of evidence, I will consolidate the first and second issues and determine them together.

On the issues whether Plot No. 98, Block G, and Plot 646 Block G overlap each other and whether there was trespass by the 2<sup>nd</sup> defendant to the Plot No 98, Block G, the material evidence of the witnesses that establish the correct boundaries have been clear and straight forward.

It should be noted that Plot No. 98 Block G which according DW1 is now known as Plot No. 695 Block G (herein referred to as Plot No. 98) is the land property owned by the Plaintiff. None of the parties or witnesses refuted the fact that the plaintiff is the owner of the Plot No. 98, Block G Kihonda Area, Morogoro Municipality in Morogoro Region. The evidence of all witnesses confirmed that the plaintiff is the owner of Plot No. 98.



Again, it is not in dispute that Plot No. 646 Block G, Kihonda Area, Morogoro Municipality in Morogoro Region is owned by the 2<sup>nd</sup> Defendant. However, while the defendants assert that the entire Plot No. 646 is owned by the 2<sup>nd</sup> defendant, the plaintiff complained that part of Plot No. 646 is his which deducted a portion of his Plot No. 98 by 37.2 metres, being a deduction of the width of 7.44 metres and length of 5 meters at the western part of his Plot where he borders the 2<sup>nd</sup> defendant. Thus, the only contentious issue in present suit is the alleged reduction of the plaintiff's Plot No. 98 by width of 7.44 metres and length of 5 metres at the western side of his plot.

According to the plaintiff, the changes in measurements that are currently used by the 1<sup>st</sup> defendant arose from the 1991 drawing which is contrary to the 1992 drawing which in his view, had the correct size of his land. He testified that in the drawing of 1992, it is shown that in his boundaries that there were 43 metres at the south bordering the airport, 56 metres at the west bordering the 2<sup>nd</sup> defendant, 24 metres at the north bordering the road, and 45 metres at the east bordering Plot No. 97. He alluded that the 1991 drawing which is used by the 1<sup>st</sup> defendant showed a reduction where there were 35.5 metres at the south bordering airport, 54.81 metres at the west bordering the 2<sup>nd</sup> defendant, 23.91 metres at the east bordering the road as

the drawing also dislocated the road measurements which blocked the front part of his house. He contended that the portion was deducted by the 1<sup>st</sup> defendant and given to the 2<sup>nd</sup> defendant constituting trespass by the 2<sup>nd</sup> defendant onto his Plot No. 98.

To the contrary, by using Town Planning Drawing No. 10/160/183 (Exhibit DE1) registered in 1992 and the registered Survey Plan No 81594 (Exhibit DE2) for Plot No. 695 Block G, Kihonda (formerly Plot No. 98 Block G Kihonda), DW1 showed the plaintiff's Plot No. 98, its boundaries being similar to the ones named by PW1, and testified that its size was 1447 square metres, low density with Plan Number B13 169/264 and registered plan number 81594. He identified the plaintiff's plot in Exhibit DE2 whose boundaries had four beacon marks BCD 23 and BCD 57; BDP 184 and BDP 185 and a building which was found during survey. He testified that there were no any changes in Plot No. 98 except the changes in number of the plot from Plot No. 98 to Plot No. 695 after reallocation.

From the above evidence, I find the plaintiff's allegations wanting for the reasons that the plaintiff failed to prove the existence of the 1991 and 1992 drawings that would assist the court to compare between the two and determine whether there were such changes of the plaintiff's as alleged.

Further, the plaintiff failed to prove that the current drawings used by the 1<sup>st</sup> defendant is of 1991 and not 1992 especially in this case where DW2 testified that the map that is being used was registered in 1992. As alluded earlier on above, it is a settled law under section 110 of the Evidence Act and through numerous decided cases that the one who alleges existence of certain fact must prove the existence of such facts. In **Paulina Samson Ndawavya Vs Theresia Thomas Madaha**, Civil Appeal No 45 of 2017 (Unreported), the Court of Appeal amplified section 110 and reiterated that:-

*"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."*

On page 15 of the same judgment, the court in emphasizing on the onus of proof on the person alleging existence of a certain fact reproduced an extract passage from Sarkar's Laws of Evidence, 18<sup>th</sup> Edition M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, where the author categorically explained that;

*"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason..."*

In this case, the plaintiff has asserted the existence of two maps, that of 1991 and 1992. Under the circumstance, the onus proof lied upon him to establish the changes made thereto and how the same affected the size of his land. In the absence of such proof, I am inclined to hold that plaintiff herein failed to prove his claims over the alleged trespass of his land in the standards required by the law.

In addition to the above, the plaintiff failed to prove that his plot had a total of 1687.9 sqms compared to 1447 sqms shown in Exhibit DE2 and on the actual ground. I say so because, in his testimony PW1 contended that when he was given Plot No. 98 in 1988, his plot was measuring 1687.9 sqms. But he found the beacon already set including at the western part of his plot where he claimed it was deducted by 7.44 by width metres and 5 metres by length. That piece of evidence prove that the area was surveyed and beacons was set on Plot No. 98 before the plaintiff was granted the plot.

At the visit at the *locus in quo*, PW1 showed the location of the previous beacon which he found when he was granted Plot No. 98. The distance between the location of the previous beacon and the new one was 25 centimetres which is equivalent to 0.025 metres by width meaning that the changes added the plaintiff's land size by 0.025 metres by width at his advantage.

Contrary to Exhibit DE1 and DE2 and the evidence of PW1 that he found the beacons which were more or similar to the current beacons, PW1 relied on the site plan (Exhibit PE3) and information supplied to him by an officer from the 1<sup>st</sup> defendant, one Mbilikila that his plot extended to 43 metres at the south bordering the airport, and 56 metres at the west hence extending his land by 7.44 metres and 5 metres, respectively. In essence, the plaintiff wrongly relied on the site plan made for construction purposes made by one Hassan Mwaliko and the words of the Mbilikila to claim that his land was extended to cover a total of 37.2 metres. I am saying so because, if the plaintiff found beacons when he was granted land, how could he object to the size of his land by relying on the construction drawing/the site plan and the words of Mbilikila who was not the office responsible for land matters?

Again, PW1 and DW2 testified that it was the plaintiff who built burnt clay bricks wall and the wired fence demarcating his plot No. 98 with the 2<sup>nd</sup> defendant's in 2003. Both PW1 and DW2 testified that the plaintiff built the wall and wired fence with trees when the 2<sup>nd</sup> defendant was on his plot, Plot No. 646. During the Court's visitation at the *locus in quo*, it was found that the demarcation consisting of built burnt clay bricks wall, trees and the wired fence built by the plaintiff, was exactly the boundary of the two Plot No. 98 and Plot No. 646 owned by the plaintiff and the defendants, respectively. The demarcation matches the measurements in Exhibit DE2 and those testified by the DW1 and disapprove the plaintiff's allegations that his land was deducted by 7.44 and 5 metres.

Although the plaintiff argued that he built the wall for safety while he was resolving the boundary dispute with the 1<sup>st</sup> defendant, but as held above, the plaintiff failed miserably to prove that his land size was 43 and 56 metres on the southern and westerns side, respectively, prior to his acquisition of Plot No. 98 especially when there were beacons set thereon. It would have different if the plaintiff found the beacons on the side that he claimed his land extends. But if at the time of his acquisition of the plot, the beacon was



0.025 metres within his plot at the western side, the claim that his land was deduced at 7.44 and 5 metres had no factual or legal backing.

I find the testimony of DW2 that he found the plaintiff on Plot No. 98 when the 2<sup>nd</sup> defendant acquired the land, and that it was the plaintiff who build the wall demarcating the 2<sup>nd</sup> defendant's plot and the plaintiff's, clearly establish that Plot No. 98 did not undergo changes that deducted his land for about a total of 37.2. If there were any changes, the same was about 0.025 metres as pointed out by PW1, which extended the plaintiff's Plot No. 98 for about 0.025 metres.

The evidence in the correspondence including the plaintiff's letters of complaint, the response from the 1<sup>st</sup> defendant land complaint committee and the Ministry of Lands, Exhibit P4 and P5, proved that there was a dispute that was reported and directives for resolution were made. However, the same did not prove that there was overlap of between Plot No. 98 and Plot No, 646 owned by the plaintiff and the 2<sup>nd</sup> defendant, respectively.

Further, the plaintiff did not prove that the drawing used by the 1<sup>st</sup> defendant is incorrect and contrary to the alleged drawing of 1992. Similarly, neither



is the plaintiff's drawing that there was an overlap between Plot No. 98 and Plot

No. 646 owned by the plaintiff and the 2<sup>nd</sup> defendant respectively.

Further, the plaintiff did not prove that the drawing of 1992 was incorrect and

contrary to the drawing of 1992. Similarly, neither

did he prove that the plaintiff's Plot No. 98 was deducted by 37.2 metres at the western side of the plot nor the trespass by the 2<sup>nd</sup> defendant.

It is a common knowledge that for the plaintiff to prove the defendant's act of trespass, he must prove that he is the owner of the alleged trespassed piece of land and that the defendant intruded into the said land without the plaintiff's permission. In **Salim Said Mtomekela Vs Mohamed Abdallah Mohamed**, Land Case No 78 OF 2015 (Unreported) on page 15, the court upon being confronted with determination of an issue as to whether the defendant had trespassed in the plaintiff's land, borrowed a leaf of wisdom from the case of **Frank Safari Mchuma Vs Shaibu Ally Shemndolwa**, [1998] TLR 280 on page 288, where the term trespass to land was defined as follows;


*"By definition trespass to land is unjustifiable intrusion by one person upon the land in the possession of another. It has therefore been stated with a light touch that: "If the defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile in it" (Ellis vs Loftis Iron Co. (2) per Coleridge C.J. at Page 12) ..."*

Inspired by the above decision and based on the foregoing analysis of evidence, I find the plaintiff to have failed to establish his ownership of the alleged intruded piece of land and the unjustified intrusion of the same by the 2<sup>nd</sup> defendant. I am constrained to find the first and the second issues in the negative that there was neither overlap between Plots No. 98 Block G and 646 Block G nor trespass by the 2<sup>nd</sup> defendant to Plot No 98, Block G.

As to the reliefs, I find the plaintiff to have miserably failed to prove his allegations contrary to the dictates of section 110 and 111 of the Evidence Act. The plaintiff is not entitled to any of the reliefs claimed in his plaint and those articulated by him during his testimony in Court. Consequently, the present suit is without merit and I proceed to dismiss the same with costs.

It is so ordered.


**DATED** at **MOROGORO** this 28<sup>th</sup> day of March 2024.

  
**H. A. KINYAKA**  
**JUDGE**  
**28/03/2024**



**court**

The typed judgment is delivered in open Court by F.Y. Mbelwa, Deputy Registrar, on presence of parties save for 2<sup>nd</sup> Defendant. This 28<sup>th</sup> March, 2024.

  
F.Y. Mbelwa

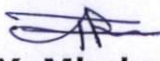
**DEPUTY REGISTRAR**

**28/03/2024**



**Court:**

Right of Appeal is explained.

  
F.Y. Mbelwa

**DEPUTY REGISTRAR**

**28/03/2024**

