

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

LAND CASE NO. 08 OF 2023

DESDERY NOVATH.....1ST PLAINTIFF

YORAM NOVATH.....2ND PLAINTIFF

VERSUS

CHANIKA VILLAGE COUNCIL.....1ST DEFENDANT

KARAGWE DISTRICT COUNCIL.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

06/05/2024 & 29/05/2024
E.L. Ngigwana, J

This suit touches on ownership of a parcel of land located in Chaibulumba Hamlet, Chanika Village, Chanika Ward within Karagwe District in Kagera Region. The plaintiffs allege that they are the lawful owners of the suit land after the same had been bequeathed to them by their father namely Novath Mbaulila Kagaruki sometimes in 2012.

According to the plaint, the suit land was initially owned by one Lwakwibweine Katebalilwa, but in 1989, he disposed it to the plaintiffs' father by way of sale. It is further stated in the plaint that in 2017, the 1st and 2nd defendants encroached and acquired the suit land on public interests

grounds, but the procedures for acquisition were not followed. The plaint is further to the effect that on 2/06/2027, the 1st defendant, without any authority, consent and legal justification wrote a letter to the plaintiffs stopping them from doing anything utilizing the suit land, and further on 06/06/2017 they forcefully entered into the suit land and took possession, cleared the suit land by cutting down trees and other plantations and then, put building materials for purpose of construction. It was further averred that the plaintiffs issued a statutory notice to the defendants but they received no response and hence this case. The 3rd defendant, being a Chief legal advisor of the Government has been joined in this suit as a necessary party by virtue of the Government Proceedings Act.

The plaintiffs pray for judgment and decree against the defendants as follows;

- 1. An order permanently restraining the Defendants, their agents or assignees from entering into the suit land as are trespassers.*
- 2. An order declaring the Defendants' acts of encroachment to the suit land of the plaintiffs without notice or consent was unlawful.*

3. *The Defendants be jointly and severally ordered to pay general damages to the tune of TZS. 30,000,000/= as the Honourable court may deem fit to meet the end of justice,*
4. *Costs of the suit*
5. *Any other orders/ reliefs the Honourable court may deem fit and just to grant for the interests of justice.*

Upon service of the Plaint, the Defendants filed their joint written statement of defence (WSD). They disputed the claims put forth by the Plaintiffs. They stated that the suit land was acquired by the first defendant during Villagelization/ Operational Vijiji in 1971 and from 1971, to 2017, the suit land had been used by the 1st plaintiff.

Before the commencement of the hearing, the following issues were framed and agreed upon for determination:-

- (1) *Who is the rightful owner of the suit land?*
- (2) *Whether the plaintiffs are entitled to compensation from the 1st and 2nd defendants.*
- (3) *To what reliefs are the parties entitled to.*

When the matter was called on for hearing, the plaintiffs had the legal service of Mr. Frank John Karoli learned advocate while the defendants appeared

through Mr. Lameck Buntuntu and Mr. Kelvin Mashole, both learned State Attorneys.

The plaintiffs' side featured five (5) witnesses and tendered two documentary exhibits to wit; copy statutory notice (exhibit M1) and sale agreement (Exhibit M2.) On the other hand, the Defendants' side featured two (2) witnesses and tendered two (2) documentary exhibits to wit; minutes of the Village Council meetings (Exhibit D1 and D2).

The plaintiffs who testified as PW1 and PW2 respectively gave a similar evidence that the land in dispute whose size is estimated to be seven (7) acres was bequeathed to them in 2012 by their father and since then, they had been using the said land. PW1 added that he built a small mud house roofed with 16 sheets but also planted trees and banana plants while PW2 testified that he planted banana plants in 2014.

They went on to give similar evidence that in 2017, the 1st defendant wrote a letter to them stopping them from developing the said land and few days later, the 1st and 2nd defendants trespassed into the disputed land and destroyed the house of PW1 and their plants and then, constructed thereon Nyakasozi Primary School and Nyakasozi Dispensary.

Each of them went on testifying that since the 1st and the 2nd defendants acquired his land without compensating him, he deserves compensation to the tune of TZS.50, 000,000/=

On cross examination, PW1 said that his father purchased the said land from one Lwakwibweine Katebalilwa, and later bequeathed to them. He admitted that he possess no document to prove that the said land was given to them as a gift. He added that currently, the market value one acre is **TZS.7, 500,000/=**. On cross examination, PW2 said that he knows nothing about Operational Vijiji or the Village Development Fund (Mfuko wa Maendeleo ya Kijiji (MFUMAKI). PW2 said that when the land in dispute was given to them, village leaders were not involved likewise the Village council.

Novath Kagaruki (PW3) who the biological father of the plaintiffs testified that he purchased the suit land in 1989 from one Lwakwibweine Katebalilwa at the price of TZS. 50,000/= and the sale agreement was reduced into writing. The sale agreement was admitted and marked Exhibit M2. He added that, though a Primary School and a Dispensary have been constructed in the suit land, the 1st and the 2nd defendant did not procedurally acquire the said land from the plaintiffs. He further testified that the suit land was also used to cultivate crops for MFUMAKI

On cross examination, PW3 said that MFUMAKI started in 1987. He added that Novath Kagaruki and Mbaulila Kagaruki are his names and he used them interchangeably though he had not tendered an affidavit to that effect.

Gresmo Lugakingira Waswa (PW4) testified that from 2010- 2016, he served as the Chairman of Chanika Village. He added that his predecessor was Damian Kapanabo. He went on to testify that during the handing over exercise; he was not informed that the suit land that situates at Nyakasozi was owned by Chanika Village. According to him, the suit land belongs to PW3.

On cross –examination, he said that he was not aware that PW3 distributed the suit land to the plaintiffs. He added that, to his understanding, Nyakasozi primary school was constructed on the land of PW3.

Jonas Emmanuel (PW5) testified that he had been a member of Chanika Village Council for ten (10) years from 2005 -2010 under the chairmanship of PW4. He added that Nyakasozi Primary School was built on the land which was purchased by PW3. He added that the suit land was never identified to them as lawfully owned by Chanika Village. He went on testifying that the land had pines, eucalyptus and banana plants. That marks the end of the evidence of the plaintiffs' side.

Damian Kafanabo Sebastian (DW1) testified that from 1985 -1992, he was a Secretary of Chama cha Mapinduzi (C.C.M)- Chanika Branch. He added that before the introduction of multiparty system, the Branch secretary was also the village executive officer. He went on to testify that from 1971-1978, through the exercise of Operation Vijiji, all open lands were acquired by the government and planned them for better use. He added that Chanika Village had five open lands and they were acquired and planned for good use. DW1 went on saying that the land in dispute was dedicated for the purpose of cultivating maize and beans to raise money for Mfumaki, and no decision was taken without conducting the village council meeting. The minutes of Chanika Village Council dated 14/03/1987 and 15/01/1985 were admitted and marked exhibit D1 and D2 respectively. DW1 added that the suit land is lawfully owned by Chanika Village. He added that, in 2017, through the village general meeting, it was decided that a primary school be constructed at Nyakasozi since the land was lawfully owned by Chanika Village Council.

On cross- examination, DW1 said that Nyakasozi was an open land, thus no person was living thereon.

Edelbert Wilson (DW2) simply testified that he was the Chairman of Chanika Village from 2015-2020. He added that in 2017, it was decided through the village general meeting a primary school and Dispensary should be constructed at Nyakasozi since the land belongs to Chanika Village Council.

On cross examination, DW2 testified that PW4 showed and proved to them the land belongs to the village. This marks the end of the defence evidence.

Having gone through the evidence presented both oral and documentary, I will now determine the framed issues, the first one being who is the rightful owner of the suit land. It is a cherished principle of law that, generally in civil cases, **the burden of proof lies on the person who alleges anything in his or her favour**. This is the essence of the provisions of sections 110 (1), (2) and 111 of the Evidence Act, [Cap. 6 R. E 2022].

It is a settled principle that he who wants the court to give verdict in his favor on a certain right or liability depending on the existence of certain facts, must prove that the same do exist. Thus, the burden of proof lies on that person who alleges. This principle of law is sourced under section 110 (1) and (2) of the Evidence Act, Cap. 6 R: E 2019 which provides that;

(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

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

The standard of proof required in civil suits like the instant case is on the balance of probabilities. This was emphasized by the Court in the case of **Paulina Samson Ndawavya versus Theresis Thomas Madaha** (Civil Appeal No. 45 of 2017) [2018] TZCA 218 (11 October 2018), as follows;

"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."

As I have pointed out earlier this suit touches on ownership of the suit land. The plaintiff who sued the defendants in court claiming ownership of the land in dispute is required to lead cogent and admissible evidence to prove by what means he/she claims to be the owner of the land on a balance of probabilities.

According to the evidence of the plaintiffs (PW1 and PW2), the suit land belongs to them after it had been bequeathed to them by their father (PW3), in 2012. Though there is no documentary evidence to the same effect. The evidence by PW4 and PW5 is to the effect that the land in dispute is owned by PW3.

In his evidence PW3, confirmed that he bequeathed the suit land to his biological sons (PW1 and PW2) after he had purchased on 25/06/1986 from one Lwakwibweine Katebalilwa at the price of TZS. 50,000/=.

There is no dispute, the land in dispute was un-surveyed and under the jurisdiction of the village Chanika Village. The position of the law has long been settled to the effect that the sale of a village land becomes lawful upon obtaining sanction of the Village Council. This legal position was settled in the long celebrated case of **Metthuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu** [1985] T.L.R. 103.

The rationale behind such requirement is to avoid fraudsters who would sale lands not belonging to them because the village authority is in a better position of knowing its people and the lands legally allocated to them. **See Mayuma Investment Co. Ltd versus Attorney General** (Land Case No.9 of 2028) [2020] TZHC1901 (10 June 2020) Tanzlii.

It the case at hand, the sale agreement (Exhibit M2) was not approved by the village council or witnessed by any village leader. Undoubtedly, Chanika village council was in a better position of knowing its people and the lands legally allocated to them including the land of Lwakwibweine Katebalilwa if at all there was a land allocated to him by Chanika Village Council. The evidence on record is that Chanika Village Council was registered in 1976 and the alleged sale transaction took place in 1989. Exhibit M2 is also not free from doubt full because some words appear to have been uttered. Unfortunately, the writer of the same did not appear in court to testify. PW1, PW2, PW4 and PW5 did not witness the sale agreement, and PW3 is an illiterate person. Furthermore, Exhibit M2 revealed that the land sold to PW3 situates Umuhagongo within Chanika Village but the plaint is to the effect that the land in dispute is located in Chaibulumba Hamlet in Chanika Village. Unfortunately, there is no evidence adduced showing that Chaibulumba and Umuhagongo are the names of the same place but used interchangeably.

On the other side, the evidence adduced by DW1 is very strong to the effect that in 15/01/ 1985, the land in dispute was set and dedicated for MFUMAKI activities. Part of Exhibit D2 Reads;

"Baada ya Serikali ya Kijiji kupitia Mapendekezo ya wajumbe na kuridhia mipango, Mkutano unaridhia na kutenga maeneo yafuatayo na hayatumika tena kwa matumizi binafsi ila kwa matumizi ya umma

1. Eneo la Rwakahicho Shule ya Msingi

2. Eneo la Umurulama Kanisani

3. Eneo la ofisi ya Tawi Kijiji

4. Eneo la Nyakashozi litumike kwa ajili ya MFUMAKI

5. Eneo la Binango Kanisani. Pia eneo litabadilishwa matumizi kwa maazimio ya Mkutano Mkuu"

Cultivation of crops went on at Nyakashozi are revealed on page 3 of Exhibit D1. DW2 added that the Nyakashozi Primary school and Nyakashozi Dispensary were constructed in 2017 after the resolution made in the Village general meeting. PW1, PW2, PW3, PW4 and PW5, all admitted that a public primary school and Dispensary were constructed in Nyakashozi area.

According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win...in measuring the weight of evidence it is not the number of witnesses that counts most but the quality of the evidence. See **Hemed Said versus Mohamed Mbilu** [1984] T.L.R 113.

Now, the major question here is whether it can be said that PW3 had legally purchased the land in dispute on 25/6/1989 from Lwakwibweine Katebalilwa, and legally bequeathed it to the plaintiffs. The answer is definitely in the negative because reading the defence evidence especially Exhibits DI and D2 tendered by DW1, is apparent that the land in dispute was set aside for public use since 1985, and in 2017, it was decided in a village general meeting that a primary school and a dispensary be constructed in the said land. In that respect, it goes without saying that alleged sale between PW3 and Lwakwibweine Katebalilwa was a nullity because Lwakwibweine Katebalilwa had no good title to pass over to PW3, and equally, PW3 had no good title to pass over to the plaintiffs. In other words, the defence evidence is strong to the effect that the plaintiffs are not the lawful owners of the suit land. The owner of the same is the Chanika Village Council.

It is very important to always remember the maxims: **nemo dat quod non habet which is allied to; nemo plus juris ad alium transferre potest quam ipse habet**, that is, no one can give what he or she does not have and no one can transfer any right greater than he himself possesses. It means that where a person who is not the owner and possesses no mandate to do so purports to sell or transfer property, such sale or transfer is a nullity.

See H Silberberg and J Schoeman, Silberberg and Schoeman's The Law of Property, 2nd edition, Butterworths, Durban, 1983 at p72.

The second issue is whether the plaintiffs are entitled to compensation from the 1st and 2nd defendants. The evidence adduced by PW1 and PW2 is to the effect that they deserve compensation from the 1st and 2nd defendants for their act of acquiring their land illegally. However, it must be noted that the law entitles to compensation a person who effects development on the land he legally owns or has authority to do so. This stance was emphasized by the Court of Appeal in **Ntiyahela Boneka versus Kijiji cha Ujamaa Mutula** [1988] TLR 156 cited in **Tenende Budotel and Another versus The Attorney General, [2012] T.L.R 459 [CA]** and **Grace Olotu Martin versus Ami Ramadhani Mpungwe** (Civil Appeal No.91 of 2020) [2023] TZCA 193 (20 April 2023) that: -

"(1) A person is entitled to compensation for improvements effected on the land provided that at the time of carrying out such improvements he had apparent jurisdiction for doing so."

In the present case, the plaintiffs were not the owners of the suit land hence deserve no compensation for the development (if any) done by them.

In the final analysis, the plaintiffs' suit is devoid of merit. Consequently, it is hereby dismissed. I order that each party shall bear its own costs.



E.L NGIGWANA

JUDGE

29/05/2024

Court: Judgment delivered this 29th day of May 2024 in the presence of the 2nd plaintiff in person, Mr. Victor Joseph Mhana and Magreth Mwenda, both State Attorneys for the defendants, Hon. A.A. Madulu JLA, and Ms. Queen Koba B/C.



E.L NGIGWANA

JUDGE

29/05/2024