

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT IRINGA

LAND CASE NO. 2 OF 2013

HENDRY JOSEPH LYIMO PLAINTIFF

VERSUS

LOLAND MAYEMBA DEFENDANT

13/3/2015 & 16/4/2015

EXPARTE JUDGEMENT

MADAM SHANGALI, J.

The plaintiff HENDRY JOSEPH LYIMO has filed this land suit in this court against the defendant LOLAND MAYEMBA alleging that the defendant, without any legal justification had invaded the plaintiff's farm and unceremoniously harvested the 450 pine trees valued at T.Shs.62,385,000/= the property of the plaintiff. Thus, the plaintiff's claims against the defendant is for:-

- i. The declaration that he is the lawful owner of

the 450 pine trees illegally harvested by the defendant;

- ii. Damages to the tune of T.Shs.62,385,000/= as expected income after harvesting and processing 450 matured pine trees;
- iii. Interest on special damages at the rate of 21 percent per annum from the date of harvest to the date of judgement;
- iv. Interest on the decretal amount from the date of judgement to the date of full payment at the court rate;
- v. General damages to the tune of T.Shs.50,000,000/=.
- vi. Costs and any other reliefs this court may deem appropriate to grant.

The suit was filed on 8th March, 2013. The defendant was duly served on 14th April, 2013 to appear before the court on 25th April, 2013 in order to defend the suit against him but refused or neglected to do so. On 25th July, 2013, the plaintiff was granted leave to proceed and conduct the case exparte against the defendant.

Briefly the plaintiff's claim centres on the facts that on 9th November, 2007, he purchased 590 young pine trees from George C. Mhema at a farm located at Fyoogo Area, Igoda village within Mufindi District at T.Shs.300,000/=.

The initial trespass to the farm was conducted by George Mhema and L. Mayemba who illegally harvested 140 pine trees. The plaintiff filed a suit against them before Iringa District Land and Housing Tribunal namely Land Application No. 7/2012. Plaintiff won the suit but it is now pending in this court as Land Appeal No. 1 of 2014.

The second trespass was conducted by the defendant Loland Mayemba who illegally harvested 450 pine trees. A copy of Sale Agreement of the whole pine tree farm (590 trees) between the plaintiff and George Mhema was duly annexed to the plaint as Annexure "A" and it is on evidence that the original Sale Agreement was produced as exhibit in the Iringa District Land and Housing Tribunal, Land Application No. 7 of 2012 now Land Appeal No. 1/2014 pending before this court.

According to the plaintiff's claims the main issues for determination are as follows:-

- i. Whether the said 450 pine trees belonged to the

plaintiff.

- ii. Whether the defendant trespassed into the plaintiff's land and illegally harvested the alleged pine trees.
- iii. Whether the said 450 pine trees are valued at T.Shs.62,385,000/=.
- iv. What reliefs are entitled to the plaintiff.

In order to prove his case the plaintiff gave evidence and produced two other witnesses. The plaintiff Hendry Joseph Lyimo who testified under oath as PW1, in short, informed this court how he purchased the suit land and 590 young pine trees on 9/11/2007 from one George Mhema at a price of T.Shs.300,000/=. Thereafter, when the pine trees were ready for harvest and while the plaintiff was at Dar-es-Salaam, the defendant illegally decided to harvest 450 pine trees out of the 590 pine trees. He stated that his pine tree farm was left under the care and control of Charles Mliwa (PW3) as a caretaker. That when Charles Mliwa inquired from the defendant as to why he was harvesting the trees, the defendant claimed the ownership of the trees. As a result Charles Mliwa (PW3) reported the matter to the plaintiff. The plaintiff maintained the trees with the

expectations that each tree would produce approximately 30 timber of 2 x 4 sizes worth T.Shs.4,000/= each, making a total of T.Shs.62,385,000/= for the 450 pine trees.

The next witness was Anastazia Lukas Kinyao who testified as PW2. She informed this court that she had witnessed the sale agreement which was entered on 9th November, 2007 between the plaintiff and the said George Charles Mhema in respect of 590 pine trees. That the said young pine trees were bought at the price of T.Shs.300,000/=. That the said pine trees were left under the care of the hamlet Chairperson one Charles Mliwa. She testified to the effect that in 2011 the price of one matured pine tree from Sao Hill farm was T.Shs.50,000/=. She informed this court that it was Charles Mliwa, the farm caretaker who informed her about the trespass and illegal harvest committed by the defendant.

PW.3, Charles Mliwa testified that in 2007 he was the Chairman of Fyoogo hamlet and happened to witness the sale agreement of 590 pine trees between the plaintiff, the buyer and George Mhema, the seller. Thereafter when the trees were matured and ready for harvest the defendant who was working with Mufindi District Council, Forestry Department trespassed into the farm and started to harvest the said 450 pine trees. He stated that when he inquired

from the defendant as to why he was harvesting the trees, the defendant replied that the pine trees belonged to him, having purchased the same from George Mhema. PW2 stated that he cared, natured and controlled the tree farm on behalf of the plaintiff since 2007 when the farm was purchased until 2011 when the defendant trespassed and illegally harvested the trees when they were at the age of 8 years old.

Applying the evidence on record to the issues framed by the court, the testimonies of PW1, PW2, PW3 together with the existence of Land Application No. 7 of 2012 and the pending Appeal Case No. 1 of 2014 it goes to the extent of proving that there was a sale agreement of 590 pine trees farm between the plaintiff and one George Mhema. In this court a copy of sale agreement was produced for the purpose of identification because the original sale agreement was tendered as exhibit in the above stated land case. Therefore, the first issue is resolved in favour of the plaintiff that he is the lawful owner of the 450 pine trees which were lawfully sold to him by George Mhema.

Basing on the credible evidence of PW3, the caretaker of the farm, it is beyond doubt that it was actually the defendant who harvested the said 450 pine trees belonging to the plaintiff. The fact that the said 450 pine trees were

the property of the plaintiff and the same were in the custody of PW3 for several years proves that the defendant invaded the farm and illegally harvested the pine trees without the consent of the plaintiff. That constitutes trespass and illegal acquisition of 450 pine trees, the property of the plaintiff. To that extent the second issue is resolved in favour of the plaintiff.

On the third issue the available evidence reveals that the plaintiff is claiming for the loss of his expected income which is equivalent to special damages. In law special damages are that sum of money which will put the party who has been injured or suffered, in the same position as he would have been if he was not wronged. The plaintiff has categorically stated that he expected to get approximately 30 timbers of 2 x 4 size per tree at the price of T.Shs.4,000/= per piece of timber. That means one pine tree could fetch 30 pieces of timber valued T.Shs.4,000/= equal to T.Shs.120,000/= per tree. Therefore 450 pine trees times T.Shs.120,000/= is equal to T.Shs.54,000,000/= and not T.Shs.62,385,000/=. I have also considered the evidence of PW2 who stated that in 2011 she purchased the matured pine tree at T.Shs.50,000/= from Sao Hill Company. That price was for the raw pine tree before being processed to timbers as anticipated by the plaintiff. Therefore the plaintiff is entitled to his anticipated income of