

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 104 OF 2015**

**PETER PETER JUNIOR & 17 OTHERS.....PLAINTIFF**

**VERSUS**

**MOHAMED AKIBAL.....1<sup>ST</sup> DEFENDANT**

**THE CHAIRMAN KIFUMANGAO VILLAGE.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

*6/3/2018 & 11/5/2018*

**MZUNA, J**

The above mentioned plaintiffs are claiming among others for a declaratory order that they are lawful owners of various pieces of land measuring about 200 acres at the shower of Indian Ocean at Tengeni Hamlet which was allocated to the 1<sup>st</sup> defendant with assistance of the 2nd defendant. They alleges that he trespassed and then fixed beacons without their consent.

Apparently the said plaintiffs are residents within Kifumangao Village whereby in the year 2014 the second defendant allocated 600 acres of land to the first defendant along the beach area out of the applied 1000 acres. The dispute centers on the fact that the first defendant was allocated same without first allocation alternative plots to the affected plaintiffs. Even where they were allocated alternative plots it was re allocated to the first defendant. Worse still,

they allege that they were not paid compensation as earlier on anticipated. They pray for restoration of their suit plots.

On their part, the first and second defendant says the allocation of land followed all the required procedure including convening the Village General Assembly and minutes recorded as evidenced by Exhibit D1. That it was unanimously agreed that the first defendant should create employment jobs, rehabilitate road and build a Dispensary. So, they contend that the second defendant legally allocated it to him.

The plaintiffs were unrepresented. They called in 16 witnesses namely; Peter Peter Junior (PW1) Mussa Yusuph Mbulu (PW2) Juma Ally Mazoea (PW3), Said Mfaume (PW4), Salum Ndama (PW5), Haji Masoud (PW6), Miraji Dikachike (PW7), Juma Suleiman Mohamed PW8, Saidi Mtaly Jonga (PW9), Sultan Ahamed Ngunga (10), Kassim Ally (PW11), Hamis Mbwela (PW12) Mohamed Matimbwa (PW13), Mwanaidi Ally Ndambwe (14), Hassan Mkima (PW15) and Ramadhani Demba (PW16).

Mr. Msemwa and Mr. Mtanga learned counsels represented the 1<sup>st</sup> and 2<sup>nd</sup> defendant respectively. The 1<sup>st</sup> defendant called 2 witnesses namely Abas Mohamed Juma (DW1) and Japo Ally Mkwawa (DW2). The 2<sup>nd</sup> defendant called 2 witnesses; Salum Mbwana Matimbwa (DW3) and Abas Omari Ndambwe (DW4).

Issues for adjudication are:-

- 1. Whether the 1<sup>st</sup> Defendant with the assistance of the 2<sup>nd</sup> Defendant trespassed to the Plaintiff's land and surveyed it?*
- 2. To what reliefs are the parties entitled thereto?*

Let me start with the first issue which deals with the question as to whether there was trespass by the first defendant?

Reading the evidence from PW1 to PW 16, they alleged that in total they claim 200 acres of land as follows:- PW1 (25 acres), PW4 (7 acres), PW5 (5 acres), PW6 (9 acres), PW7 (4 acres), PW9 (9 acres), PW7 (4 acres), PW9 (7 acres out of his 12 acres), PW11 (10 acres), PW14 (2 acres), PW15 (12 acres) but admitted to have been given Tshs 300,000/- as compensation. That makes a total of 81 acres.

Some of the plaintiffs like Mohamed Ngwele (7<sup>th</sup> plaintiff), Jabir Mpondi (PW16) and Shaban Ngasukia (18<sup>th</sup> plaintiff) did not give evidence in court. It was held in the case of **Jela Kalinga v. Omari Karumwana** [1991] TLR 67 (CA) that:-

*"One of the defences against an action for trespass is a claim...that he had a right to the possession of the land at the time of the alleged trespass or that he acted under the authority of some person having such a right."* (Underscoring mine).

In this case, trespass is central and therefore requires proof of one's possession of land.

Since it is now a settled law that where the claim is on land each claimant must adduce evidence to prove his/her ownership. It is also not proper for someone to adduce evidence representing another. The Court of Appeal in the case of **Haruna Mpangaos and 932 others v. Tanzania Portland Cement C. Ltd, Civil Appeal No. 129 of 2008** (unreported),

quoted with approval the case of **Nafco v. Mulbadaw Village and Others** [1985] TLR 88 and held that:

*"Since the land is not jointly owned all the appellants and since it is them in their individual capacities who claimed to have a better title than the respondents and as that is one of the issues raised in the suit, in terms of O. XVIII Rule 3 of the Civil Procedure Code Cap. 33 it was the duty of each appellant and not someone else to testify and prove on balance of probabilities that the disputed land belonged to each individual. That was not done. Only 13 gave evidence. In actual fact even those 13 appellants did not testify for and on behalf of 920 which is not proper either, if they had happened to do that."*

So, I hold and find that plaintiff's numbers:- 7, 16 and 18 (above referred) have totally failed to establish their claim. It is hereby dismissed.

Similarly, other plaintiffs' No. 3, 10, 12 and 13 never disclosed the size of plots they own which was trespassed. They have failed to prove that they *"...had a right to the possession of the land at the time of the alleged trespass"* in view of what was held in the case of **Jela Kalinga v. Omari Karumwana** (supra). So even the above plaintiffs have failed to prove their claims. It is equally dismissed.

What about other plaintiffs? Some of the plaintiffs like PW1 alleged that they lodged a complaint letter to the District Executive Director but never tendered such letter as proof thereof. It seems clear according to PW8 who was the Member of the Village Government for Kifumangao that there was a joint meeting between the Village Executive Officer, Village

Chairman, members of the Government and Councillor of Magawa Ward. That after that meeting then in 2014, the Investor, was granted 600 acres subject to giving to the affected Villagers alternative plots. That, contrary to the agreement, the new plots were allocated to the investor.

DW1 further testified that the plot belonged to one Mr. Mohamed Ikbar 1<sup>st</sup> defendant. The witness maintained that Plaintiffs were all compensated, and it was paid to individual separately not that it was paid to the village Government. However this witness never tendered evidence as proof of such compensation. Suffice to say that it was also an error on the defence side for their failure to call the said Mohamed Ikbar. His claim cannot be proved by DW1 Abas Mohamed Juma who posed as the supervisor of the work of the first defendant. He gave hearsay evidence because when he was cross examined by PW10 he said that he met the plot already allocated to Mohamed Ikbar. So the allegation that the plaintiffs owned huts along the shore as mere fishermen did not disentitle them right for compensation if they had established possession.

Similarly, the allegation by DW2 that some of the plaintiffs were not Villagers of Kifumangao is also subject to proof that their possession was unlawful.

DW3 who happened to be a member of the Village council then the Chairman of the street in 2005, testified that the 1<sup>st</sup> defendant applied for a plot and there was convened the village General Assembly. He clarified that the village council through the General assembly, which grant right of occupancy allocated 1000 acres to the first defendant. He never paid money but promised to build a dispensary and periodic maintenance of a road.

That evidence was given support by DW4 who said that the 1<sup>st</sup> defendant was given the plot after a consent of the General Village Assembly. He tendered the minutes showing **"Kukubaliwa maombi yenu ya kuwekeza"** which was admitted as **Exhibit D1**. The relevant parts of the contents of **Exhibits D1** reads:-

***"YAH: kukubaliwa kwa maombi yenu ya kuwekeza eneo la kando ya bahari na juu katika kijiji cha Kifumangao***

***Hii ni rejea ya barua yako ambayo iieieza maombi ya meneo ya fukwe pamoja na ya juu kwa ajili ya shughuli za maendeleo kwa njia ya uwekezaji.***

***Napenda kuchukua nafasi hii kukuarifu rasmi maombi yenu yamekubaliwa katika mkutano Mkuu maaiumu uiiofanyika tarehe 11/01/2011.***

***Mkutano uliazimia kwamba mnapofanya shughuli zenu mjali pia masiahi ya kijiji kama vile ajira kwa wanakijiji kwa zile kazi ambazo haziitaji utaalamu.***

***Aidha mushiriki katika shughuli mbalimbali za maendeleo zitakazofanyika hapa kijijini kwa hali na mali pamoja na kutoa michango mbalimbali itakayohitajika kwa ajili ya maendeleo."***

DW4 further testified that the village council can grant from one acre to 50 acres of land, therefore a Village cannot grant more than 50 acres unless they are more applicants. That, they allowed 1<sup>st</sup> defendant to be given 1000 acres because he was representing others. The 1<sup>st</sup> defendant was allocated 50 acres while others had their respective plots/acres making a total of 1000 acres.

A court witness one Moshi Salum Mkinda (CTW1), testified that the dispute is on part of the plot which was given to the investors alleged to belong to the villagers. He said that currently the disputed plot of land is a bare land and undeveloped.

Reading from the above evidence, it is clear that even the defence evidence has also some shortfalls. DW4 says was the then Village Executive officer, who supervised during the convening of the Village General Assembly meeting and signed minutes (Exhibit D1). Though he said there was a unanimous resolutions, however the tendered document (exhibit D1) has some members who did not sign like Mwishehe Mkokwa (23), Mariam Mapande (64), Fatma Ame (78), Zuhura Omari (79), Asia Omari (80), Fatuma Mpogo (81), Mariam Omari (82), Kurusumu Ally (83), Salima Athuman (84), Hadija Omari (85), Amina Mtulia (86), Hassani Ripiti (106), Mwakisu (110), Aziza Juma (125), Mariam Sultan (126). That makes a total of 15 Villagers who did not sign out of 133 members. Even DW4 admitted this fact. It came out that even some of the plaintiffs were not made aware of such meeting.

I find and hold that the resolution reached thereon was not from the Village General Assembly otherwise all members ought to have signed. This defect would mean that the grant of land to the defendant No.1 never followed the procedure and is hereby nullified with a direction that another meeting be convened.

This finding finds further support from the fact that there were other applicants apart from the first defendant whose names are unknown and never testified in court.

Taking one's land must go hand in hand with payment of compensation. The defence has never disproved that the plaintiffs were not paid compensation except the 15<sup>th</sup> defendant who admitted to have received Tshs 300,000/-. If as DW1 said the investor built a dispensary at the lintel level that did not rule out the issue of being paid alternative plots and or compensation as the case may be. Actually even the said DW4 Abas Omari Ndambwe, a witness for Kifumangao Village said that up to 2009, when he left as the VEO of Kifumangao, the plaintiffs were not paid compensation.

There is a dispute as well on the installed beacons. It was not improper and contrary to law to install beacons or resurvey the area without involving all parties to the dispute. That was held in the case of **Obed Mtei v. Rukia Omari** [1989] TLR 111 (CAT).

Based on the above evidence, I cannot grant ownership even to other plaintiffs because they merely alleged to possess land without proof that indeed there was a blessing from the Village leaders. They never tendered documents which granted them such possession.

The first issue is partly allowed as the plaintiffs were not involved in granting land to the first defendant and subsequent installation of beacons, there was also no payment of adequate compensation and or alternative plots.


Lastly on the reliefs. I desist from declaring the 1<sup>st</sup> defendant to be a trespasser nor are the plaintiffs lawful owners. I hereby direct that the dispute be referred back to the Village Officers of Kifumangao who should work in collaboration with the District leaders to have this dispute resolved



amicably. This does not cover plaintiffs Nos. 3,7,10,12,13,16 and 18 whom I have dismissed their claims.

I say so because though the defence alleges the first defendant was allocated 1000 acres, it became apparent that the said acres are far beyond the powers of the Village General Assembly. Further, it was also established that when the surveyors came, it was found that the area could not cover such 1000 acres but only 600 acres.

I am aware that proof in civil cases is on the balance of probabilities. From the above analysis of the evidence, I find that the suit is partly allowed and partly dismissed. Each party to bear its own costs.

  
**M. G. MZUNA,**  
**JUDGE.** 10/5/2018

**11/05/2018**

**Coram** – Hon. J. C. Tiganga DR

**For Plaintiffs:** present in person

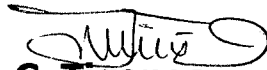
**For 1<sup>st</sup> Defendant:** } absent

**For 2<sup>nd</sup> Defendant:** }

**C/C:** Bukuku

**ORDER:**

Judgment delivered in open chambers in the presence of the parties as to per coram.



**J. C. Tiganga**  
**DEPUTY REGISTRAR**  
**11/05/2018**