

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND CASE NO. 34 OF 2016

SHEILA ELANGWA SHAIDI..... PLAINTIFF

VERSUS

1. ABRAHAM KILINDO
2. PAULO WILFRED MDOGO
3. MOHAMEDI SALUM MSULWA DEFENDANTS
4. EMMANUEL LAKATI
5. JOHN IGNAS LASWAI

JUDGMENT

S.M KALUNDE, J:

On the 10th February, 2016, **SHEILA ELANGWA SHAIDI**, the plaintiff herein, filed a suit praying against the defendants seeking for, *inter alia*, a declaration that the plaintiff is the lawful owner of 33 acres of land identified as **Farm Number 3319**, situated at Sungwi, Kisarawe with the title No. 77990 ("**the disputed land**"); that the defendants be declared as trespassers into the disputed land; an order of perpetual injunction against the defendants; an order that the defendants demolish their structures erected into the disputed land; general damages and costs of the suit.

In accordance with the pleadings, the disputed land was part of the land previously owned by the late **ELANGWA SHAIDI** ("**the deceased**"), who passed away in 1984. Upon his demise

one **HAWA ELANGWA SHAIDI** ("*the widow*") was appointed as the administratrix. Upon distribution of the assets of the late Elangwa Shaidi, in 1987 the plaintiff was allocated the disputed land as one of the heirs to the deceased. After being allocated with the said land, the plaintiff applied to the village government and was allocated the farm together with her siblings. She later applied to have the farm surveyed and obtained a Certificate of Title (C.T) No. 77990, which was issued on 18th August, 2007. She complained that around 2010 she noticed that the farm had been trespassed by the defendants who had erected structures and were growing various food crops into the disputed land.

Through their joint written statement of defence (WSD) filed to this Court on 17th March, 2016, the defendants denied that the plaintiff was the lawful owner of the disputed land. The defendants pleaded that the 1st defendant was the lawful owner of approximately 10 acres which he acquired in 1985 upon application and allocation by the Sungwi village government. He alleged that ever since then he had enjoyed peaceful occupation of the piece of land until around 2007 and 2008 when the plaintiff started surveying the land. The 2nd and 3rd defendants claimed to have inherited their land from their parents, that is the late Wilfred Mdogo and Mohamed Msulwa respectively. It was pleaded further that the 2nd defendant was the one who sold a portion to the 4th defendant. On his part the 5th defendant pleaded that he came into possession of the land after buying it from Adam Kumtoni, who

inherited it from his late father, on Mzee Matete. The defendants requested the dismissal of the suit with costs for being devoid of merits.

Together with the WSD, and based on the same set of facts, the defendants filed a counter claim against the Plaintiff, **SHEILA ELANGWA SHAIKI** (the plaintiff) and his brother **HUSSEIN ELANGWA SHAIKI**. In the counterclaim the defendants, jointly and severally, prayed for judgement and decree against the defendants as follows: (a) a declaration that the defendants were trespassers into the plaintiff farms; (b) nullification of CT No. 77990; (c) a declaration that the late Elangwa Shaidi only owned 40 acres at Sungwi village; (d) a declaration that the defendants disobeyed a lawful order issued by the Kisarawe Ward Tribunal and Sungwi Village Land Council; (e) a permanent injunction against the defendants; (f) payment of Tshs. 50,000,000 for trespass; and (g) costs of the suit.

The defendants to the counterclaim filed their joint written statement of defence on 26th May, 2016, the effect of which was to deny the allegations raised by the plaintiff and a prayer that the counter claim be dismissed with costs.

On 31st May, 2018, at the Final Pre-Trial and Scheduling Conference, the following issues were agreed by the parties and framed by the Court for determination:

- (1). Among the parties, who is the lawful owner of the suit property;**
- (2). Who has trespassed into the suit property;**
- (3). What reliefs, if any, are the parties entitled to**

Throughout the hearing the plaintiff was represented by **Mr. Dickson Ngowi**, learned advocate and the defendants' retained the legal services of **Mr. Hassan Ruhwanya**, learned counsel.

The counsel for the Plaintiff led evidence through three (3) witnesses who exhibited nine (9) exhibits in support of their testimony. The list of exhibits tendered and admitted for the plaintiff case included:

- 1. Exhibit P.1:** Minutes of Sungwi Village Council dated 15/12/1988;
- 2. Exhibit P.2:** A letter with reference No. KSW/2062/A/73 dated 04/11/2006 titled "Survey of Farm at Sungwi Kisarawe District";
- 3. Exhibit P.3:** a certified copy of Certificate of Title No. 77990; L.O No. 198957 for Farm No. 3319 at Sungwi Kisarawe District;
- 4. Exhibit P.4:** Two letters dated 07/10/2014 both from "*Ofisi ya Mtendaji Kata ya Masaki*" to the 1st, 2nd and 3rd defendants; and another to the Plaintiff;

5. **Exhibit P.5:** A copy of a letter from District Executive Director Kisarawe titled "*Kufufua Mipaka ya Shamba Na. 3319 Sungwi*" dated 27/03/2015; and "*Mkataba wa Kufufua Mipaka Shamba Na. 3319 Sungwi Kisarawe*" dated 13/04/2015;
6. **Exhibit P.6:** A copy of a letter titled "*Maombi ya Kupimiwa na Kumilikishwa Ardhi Eneo Liliko Kimbalaganje, Kijiji cha Sungwi*" dated 01st February, 2005;
7. **Exhibit P.7:** A copy of a letter titled "NDUGU MGENI J. MGENI" from Kisarawe District Council to the High Court Land Division, dated 04th April, 2016;
8. **Exhibit P.8:** Land Form No. 35 for transfer of a Right of Occupancy from Raymond Elangwa Shaidi to Emmanuel Kija Kamba and Kate Sylvia Kamba;
9. **Exhibit P.9:** A certified copy of Certificate of Title No. 101448; L.O No. 198909, LD No. 251529 at Sungwi Kisarawe District;

The first to the stands was the plaintiff, **SHEILA ELANGWA SHAIKI**, she testified as **PW1**. In her testimony in chief she said that her late father owned a farm measuring approximately 400 acres located at Sungwi village in Kisarawe District in Coast region. She added upon the demise of her father in 1984 the farm was distributed to the heirs and she was allocated about 12 hectares (approximately 28 acres). She added that after distribution of the

farm, his brother Raymond Elangwa Shaidi, on behalf of the family, applied to Sungwi village for allocation of the respective farms. The village council convened and allegedly allocated the farms to family members including her. She tendered **Exh P.1** as confirmation of the allocation.

Further to that, PW1, gave evidence that in 2015 she applied to Kisarawe District for resurvey of the disputed land. Upon application, the estimates for the survey were issued and an arrangement was entered between the plaintiff and Land Officers from Kisarawe Land Office to carry out the survey.

PW1 testified that, through **Exh. P2**. The District Council informed her that a survey had being conducted and the result had been forwarded at regional and the Ministerial level for approval. Later in 2007 she was invited to collect her Certificate of Title at the Ministry's office. She tendered the certificate of Title, **Exh. P.3** as evidence for allocation of and ownership of the suit property.

The witness added that on being granted with the certificate, she cleared the farm and started cultivating cassava. She recounted on or about 2010, some trespassers invaded her farm, alienated some piece of land, started cultivating and built houses. She identified the trespassers as the 1st, 2nd, 3rd, 4th and 5th defendants. She reported the matter to the Sungwi village Government. The village leaders invited parties to present their ownership documents, she presented her title. The defendants did

not produce any document and as a result, the village government allowed him to develop the farm. She tendered **Exh. P4** as evidence of the efforts made by the village government to resolve the dispute.

PW1 went on to state that, the trespassers removed the beacons fixed during the survey and as a result she had to apply for resurvey of the farm for purposes of reinstatement of the boundaries and of her application for resurvey and fixation of boundaries. Subsequently the beacons were restored, however, the defendants refused to vacate from the farm and hence she resorted to the present suit.

The witness added that, she complied with all the procedures required for allocation of a certificate of Title. Upon compliance with the procedure she was issued a certificate of Title. PW1 added that she has never alienated or sold any piece of the farm and hence she remains the lawful owner of the same. She complained that, as a result of the actions of the trespassers, she failed to develop the farm for 9 years. She concluded with a prayer that she be compensated for loss of use of the farm and costs of the suit she also insisted that the Court makes a visit to the locus in quo.

In cross-examination PW1 said she inherited the 28 acres from her father. She added that upon the demise of her father in 1984, her mother was appointed as the administratrix. As an administratrix, she distributed the farm to the Children. PW1 further stated that,

the distribution of the farm to heirs was done in 1988, the point when the family applied to the village Council for allocation of the respective plots to family members. She added that, since her mother was sick, her brother Hussein Elagwa, was the one who applied to the village Council on behalf of other family members. She also admitted that the Minutes did not indicate that Hussein Elangwa was acting for the family.

In further cross – examination the witness admitted that only Hussein Elangwa is mentioned in the minutes, but went on to say that, the minutes appended a letter with the names of the Children. However, she said that the alleged letter was not presented in court. She also said that, **Exh. P1** was minutes of **“Serikali ya Kijiji”** and that she has not presented minutes of the Village General Meeting.

In her further cross-examination she said that initially there were three (3) trespassers; and that by the time the suit was instituted they had reached five (5). She claimed to have reported the matter to Sungwi village and then to the District Authorities. When cross examined in relation to Exh. P5 **“Mkataba wa Kufufua Mipaka”** she said the process was done to replant the beacons which were uprooted by the trespassers. She added that the resurvey was conducted in 2014 whilst the original survey was carried in 2007.

In re-examination the witness stated that, Exh. P.1 intended the farm to be divided between the Children of Elangwa Shaidi. She said the names of the children were enumerated in a letter submitted to the district authorities she also said Mzee Chauka, who participated in the surveys knew all the boundaries as he was directed by their late father.

PW2, RAYMOND ELANGWA SHAIKI, also known as Hussein Elangwa Shaidi and brother to the plaintiff, stated that the defendants trespassed into his sister's farm around 2010 and 2011. PW2 said the suit property was part of his father's farm, Mr. Elangwa Shaidi, a former IGP, who owned an equivalent 400 acres land which he acquired in 1958. In his further testimony, he said that his father passed away in 1984 and his mother was appointed as an administrator of the estate of his father. His mother introduced him to the village leaders at Sungwi for purposes of facilitating inheritance of the farm by the heirs of Elangwa Shaidi.

According to PW2, his parents were blessed with eleven (11) children. He went on to say that the allocation of the estate of Elangwa Shaidi was made to only five children, that is Sheila Elangwa Shaidi, Elangwa Mcharo, Richard Elangwa Shaidi, Magreth Elangwa Shaidi, and him. He said the remaining children were not included in the division of the farm because they are residents of the USA and in accordance with the law, foreigners are not allowed to own land.

PW2 recounted that, in the process of formalization her mother introduced him to the “**Serikali ya Kijiji**” which prepared minutes for allocation of land and forwarded them to the Kisarawe District Land Office. On receipt of minutes, the Land Officer inspected the farm and issued a permanent to survey the farm. He then wrote a letter for survey and allocation of the farm at Kimbalaganje, Sungwi in Kisarawe. He tendered a copy of the letter which was admitted as **Exh. P.6** with a note that its weight will be considered in composition of Judgment.

The witness said, in the letter he applied for himself and follow relatives as indicated in the letter. In accordance with PW2, upon receipt of the application, the Land Officer, in company of village leaders, his mother and one Charles Kilenga Chauka, inspected the farm and issued costs of survey. Payments were made a survey was conducted and five titles were accordingly issued.

Further to that, PW3 informed the Court that his father employed several people in the farm including Mzee Charles Kilenga Chuka. He alienated 50 acres of his land and gave it to Mzee Chauka who was living with the 1st and 2nd defendants who were his relative. The two relatives came from “**upareni**” and continued to trespass beyond Mzee Chauka’s farm to the plaintiff’s plot.

When referred to **Exh. D.1**, PW2 said the minutes were forged as they had the stamp of the Chairperson instead of the Secretary. He also added that minutes included the Secretary and Treasury as

members of the village Council which is not the appropriate procedure. He also pointed out that the minutes were not submitted to the District Land Office. Further to that, he said, pointed that the minutes dated 26/06/1985 included Mgeni Mgeni as a representative of Kisarawe District Council whilst the said Mgeni Mgeni arrived in Kisarawe in 2005 as a Ward Executive Officer. He presented a letter from Kisarawe District Commissioners Office to support the argument that the said Mgeni Mgeni was not around by 1985. The letter was tentatively admitted and marked as **Exh. P.7** with a note that its admissibility and weight will be discussed in the composition of the Judgment.

In addition to that, PW2 said they have never been summoned to any Court. He also added that the suit property was properly acquired upon compliance with the required conditions and issuance of certificate of title by the Ministry. He said he sold his land to Mr. Emmanuel Kija Kamba and Kata Kamba. He tendered a copy Form No. 35 and Certificate Title No. 1014448 and the two documents were admitted as **Exh. P.8** and **Exh. P. 9** respectively. He said since the property was his, he had the right to sell it. Further to that, he said the plaintiff was properly allocated with the said farm and has been paying rent. He said they were not trespassers and that it was the defendants who were trespassing into the plaintiff's land. He prayed that an order of vacant possession be issued against the defendants.

During cross-examination PW2 said he was the one who notified the plaintiff about the trespassers. He said Sheila owned the farm through inheriting from her father who bought it in 1958. He said, he did not know how his father bought the land. He said, it was their mother who distributed the farm as an administratrix. He admitted that he had never produced the letters of administration as evidence.

In further cross examination, PW2 stated that, his other relatives were not allocated plots because they lived in the USA and hence could not own land in Tanzania. He also informed the Court that his father's farm was distributed to five children and five titles were issued. He concluded that the farm was lawfully allocated to Sheila.

In re-examination he said that the suit property was bordered by his farm. The late Chauka's farm, the farm belonging to Elangwa Mcharo and Richard Elangwa. He also referred to Exh. P6 and said he was the fifth applicant. As a result of the application five titles were issued to him four of his siblings.

PW3, JUMANNE SAMSON MWAMPASHE, a Land Officer from Kisarawe District Council. He outlined the procedure for allocating of village. He said that for an individual to be allocated land, one has to apply to the respective village or local government. After discussion and allocation, the application is then forwarded to

the District Land Offices. At the district level the application is processed, and ownership documents are prepared.

PW3 testified that in accordance with the records available at the District Land Office, the plaintiff is the rightful owner of Farm No. 3319 located at Sungwi village in Kisarawe. He said that in the process of application for allocation of the said farm the plaintiff was introduced by the village Council through its decision envisaged in the minutes which were prepared and forwarded to the District Land Office, and a copy of which was admitted as Exh. P1. The witness said that in accordance with procedure applicable before 1999, when **the Land Act, Cap. 113 R.E 2019** and **Village Land Act, Cap. 113 R.E 2019** (herein referred to as "**the 1999 Acts**") come into operation, CCM members were involved in discussion for allocation of village land. The witness added that in the minutes the meeting resolved that the said land had no ownership dispute and thus should be allocated to the plaintiff.

He testified that according to the available records the plaintiff was granted with a certificate of Title on 22/08/2007. He identified Exh. P.3 as the title issued to the plaintiff upon completion of the process of application. When he was referred to Exh. D1, PW3 said the minutes did not relate to allocation of land because the agenda of the meeting did not include allocation of land. He also said some of the members, example the treasury, were not involved in land allocation. In addition to that, he said the minutes included Mgeni Mgeni who was not present at the time the meeting was conducted.

Further to that he said it was wrong for the applicant, Abraham Kilindo to be part of the meeting as ordinarily it was not a procedure for the applicant to be present in a meeting discussing his application.

He also added that the 1980 minutes were not stamped whilst the 1985 minutes were signed by the Chairperson, which was not the procedure applicable pre 1999. He also said that, even post 1999 the stamps applicable were not those of the chairperson. It was his testimony that, before 1999, there was no requirement for the allocation to be passed by "**Mkutano Mkuu wa Kijiji**".

When he was referred to Exh. D.2, he said that the forms were wrong as the Village Government was not responsible for management of farms since in accordance with the Land Act, farms forms part of General Land and not Village Land, hence they were under the purview of the commissioner for land. He also said that, none of the individuals written in the said forms was registered in by the village as owners of farms in Sungwi village.

In his further testimony, PW3 said that it was not possible for a survey to be conducted over an already surveyed farm. He said that all records of surveyed farm are properly kept and any attempt to resurvey or conduct another survey would be futile. She concluded that the plaintiff was the lawful owner of the suit property having paid rent dues up to 2020.

During cross examination PW3, said that neighbors were involved during the survey and fixing of poles. He added that neighbors were required to fill survey form No. 92. He admitted that the said form was not tendered in Court. He also said that the minutes used to allocate land to the plaintiff were titled "*Serikali ya Kijiji*" as the law at the time recognized "*Serikali ya Kijiji*" as the authority for allocating land.

In relation to the minutes, PW3 said the minutes considered are those related to land allocation. He also said there is only one meeting for allocation of each piece of land and added that a meeting cannot allocated the same piece of land twice, not even to a single person, imploring that his office considered the first minutes. When asked on whether the issuance of the title to the plaintiff breached the 1999 Acts, PW3 said, although the title was issued in 2007, the procedure applicable was pre – 1999 as the process had started since 1988. He said the 1999 Acts did not stop the process of allocation that land commenced before 1999. As for the minutes he said that the minutes should contain land allocation as a clear agenda.

His re-examination was brief, he said although there was no standard formats, minutes should contain at least a title, date a list of attendances, discussion and Resolutions.

On their part, the defence exhibited six (6) witness and tendered five (5) exhibits. Of the five defendants, three testified

and called three more witnesses. The 3rd and 5th defendants did not testify in court.

DW1, ABRAHAM KILENGA KILINDO testimony in chief was that he was born in Hedaru, Same in Kilimanjaro region and moved to Sungwi Village in 1972 in search of life. On his arrival he found Mpanda Kirumbi who was also the chairperson of the village at the time. His claim was that, he owned ten (10) acre of land at Kimbalaganje, Sungwi Village, which was given to him during Ujamaa villages in 1970. He said that during the time he was handed over the said piece of land through a "**Bega kwa Bega**", that is side by side land allocation. He added that there was no document to prove that was indeed allocated the said land through "*Bega kwa Bega*".

He recalled that, on being allocated the said land, he cleared it and planted mango trees and cultivated food crops. He also built a residential house. In his testimony in chief DW1 said his neighbors were Elangwa Shaidi to the East Mohamed Salum Mauwa to the North, Wilfred Mdogo to the West and Matete to the South. He added that Elangwa Shaidi had never complained about his presence.

DW1 testified that in 1985 he applied to the village government to have his land surveyed so as he can secure a loan. A meeting was convened, he was interviewed, and minutes were prepared, the minutes of the said meeting which sat on 26/06/1985

were admitted as Exh. D1. DW1 said in further development of his farm, he grew Cashewnut, mangoes, oranges and other crops.

It was DW1 further testimony that, in 2008 the plaintiff came to erect poles in his 40 acres farm, to his surprise the poles extended to his farm and those of others. The matter was reported to the village land council. The plaintiff was summoned but refused to appear. The village Land Council allegedly visited the locus in quo and ordered DW1 to continue his occupation of the Land, he tendered Exh. D2 to witness the decision of the land Council. Subsequently, DW1 filed a suit at the Masaki Ward Tribunal, the plaintiff was summoned, again he did not appear.

DW1 stated that in 2012 he was issued with a form to show Land Ownership. He filled it and returned it to the village government. The form showed the size of his farm and neighbors. He prayed that he be declared the lawful owner of his plot and insisted on being compensated for costs.

In cross-examination he said he was invited to the village by his brother Wilfred Mdogo and admitted that on his arrival he found Chauka Charles Kilenga both of whom were from Hedaru. He also admitted that Elangwa Shaidi owned a farm at Sungwi Village and said he did not acquire it from the "Bega kwa Bega" System. He said he knew Hussein Elangwa Shaidi and said he had not trespassed into his land. In his further cross-examination he recalled that the dispute at the Village Council was against

“Familia ya Elangwa” and admitted that Exh. D2 did not mention the plaintiff.

When cross-examined on the content of the WSD, the witness said he was not aware of its contents as they were drafted in English. Further to that he argued that, he had a village title but admitted he had never produced it in Court. Further to that he admitted that Exh. D1 was not signed and stamped by secretary and that before 1999 there was a requirement to involve a party representative. In his re-amination, DW1 said that, at the Village Council they sued the whole family of Elangwa because they were many and all had invaded their farms.

DW2, PAULO WILFRED MDOGO, testified in Chief that, he own a portion of land at Sungwi village after being given by his father in 1983. He said between 1983 – 2015 he developed the land undisturbed by cultivating cashew trees, mangoes and oranges. He said that in 2015 the plaintiff invaded his plot and started electing beacons. They reported the matter to the Permanent Secretary Ministry of Land and Human Settlements. He tendered Exh. D.3 a letter to the permanent Secretary. In his further testimony, DW2 said in 2012 the Village Government required him to fill out a form to register his land. He tendered a **“Fomu ya Usajili wa Shamba”**, Exh. D.4. DW2 concluded with a prayer that the Court declares him lawful owner of his farm and declaration that the plaintiff is a trespasser. He also pressed for costs.

In cross examination DW2 said that in 2008 a leave way was cleared between his farm and that of the plaintiff. He also said by 1983 he found the farm owned by Hussein Elangwa. He said he did not inherit the farm but rather he was given by his father. In re-examination DW2 said his farm was out of the plaintiff's farm and wondered why he has been sued.

DW3, EMMANUEL JOSEPH LAKATI, the 4th defendant said he owned two (2) acres of land at Kimbalanganje, Sungwi Village in Kisarawe District. He said he bought his plot from the 2nd defendant. To prove his argument, he tendered a copy of "**Hati ya Mauziano ya Shamba**" which was tentatively admitted as Exh. D5 subject to compliance with section 47 of **the Stamp Duty Act, Cap. 189**, the requirement was subsequently complied with on 28/08/2020. In identifying his plot, DW3 said his plot was bordered by Kisadeko to the East and South, and Ignas Laswai to the North. He said his plot is not bordered by the plaintiff farm and that the plot was not within the plaintiff farm. He also claimed that he was not a trespasser and wanted to be compensated for costs.

During cross examination he said he is not aware where the 2nd defendant got his land but admitted that, it was the 2nd defendant who sold the form to him. He said it was Ignas Laswai, who bordered the plaintiff. He was not re-examined.

DW4, WILFRED MDOGO MMASA a father to the 2nd defendant testified in chief that he was given a piece of land by the

"Serikali ya Kijiji" in 1983 and subsequently gave it to his son, the 2nd defendant. He said he knew Elagwa Shaidi and added that the plaintiff farm is bordered by a farm belonging to the 1st defendant. He added that his son was not a trespasser because his farm is not bordered by the plaintiff farm. In cross examination he admitted that there was no document to show that he was given the farm by **"Serikali ya Kijiji"** He also admitted on his arrival, he found Elagwa Shaidi already there. He also admitted that Elangwa Shaidi had children, but he said he only knew Hussein Elagwa and Richard Elangwa. In reexamination he said when the **"Serikali ya Kijiji"**, gave him the farm, he was only shown his boundaries and limits.

DW5, MAULID KHALFAN MADENGE, said he was a member of the village Council between 1982 up to 1986. He recounted that the 2nd defendant was allocated a piece of land by the village Council at Kimbalaganje. He also said that Elangwa Shaidi was also allocated a piece of land at Kimbalaganje. He said the 2nd defendant had not trespassed into the plaintiff land because each one of them had their own farms. He said he was a member of the Village Council on account of a being a village accountant.

In cross examination he said his education was standard seven, but he added he acquired knowledge of accounts from Kisarawe Social Development College. He claimed he knew Elangwa

Shaidi farm and recalled that other people were given farms bordering it. He was not re-examined.

DW6, PHILIPO JOHN MTUMWINYI, his evidence was brief. He recalled that his father, John Mtumwinyi, used to grand Elangwa Shaidi's farm. He said the 2nd defendant was a neighbor to the Elangwa Shaidi. He said he left the farm in 1993 upon the demise of his father. He recalled that the 2nd defendants farm and plaintiff farm were separated by a road. In cross examination he said he has never seen Elangwa Shaidi and that ever since he left he never knew what was happening on the farm. He was not re-examined. This concluded hearing of evidence.

Upon deliberating on the evidence available on record and hearing oral argument; and following prayers by the Plaintiff, PW1 and the 4th defendant, DW3, I noted it was important to conduct an inspection to the locus in quo.

The rationale in calling for the inspection were to establish two issues, which were disputed in evidence, but are significant to the proper resolution of this matter. **Firstly**, whether the 2nd defendant's farm was outside the plaintiff's land as demarcated under the certificate of title. **Secondly**, whether the 4th defendant's plot was outside the plaintiff's land. The two complaints were raised during evidence with a suggestion that, through the suit, the plaintiff intended to, unlawfully and unjustifiably, annex the 2nd and 4th defendants' farms.

The position of the law in our jurisdiction, in relation to site visit is that, though there is no law compelling the Court to conduct a visit at the locus in quo, such visit may be conducted at the discretion of the Court depending on circumstances of each case. This view was stated in **Sikuzan Saidi Magambo & Another vs Mohamed Roble** (Civil Appeal No.197 of 2018) [2019] TZCA 322; (01 October 2019 TANZLII)

*"As for the first issue, we need to start by stating that, we are mindful of the fact that there is no law which forcefully and mandatory requires the court or tribunal to conduct a visit at the locus in quo, as **the same is done at the discretion of the court** or the tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. However, when the court or the tribunal decides to conduct such a visit, **there are certain guidelines and procedures which should be observed to ensure fair trial.**"*
[Emphasis added]

However, when a site visit is conducted certain guidelines must be complied with. The said procedures and guidelines were laid down in **Nizar M.H. v. Gulamali Faza Jan Mohamed** [1980] TLR 29, where the Court, inter alia stated that: -

*"When a visit to a locus in quo is necessary or appropriate, and as we have said, this should only be necessary in exceptional cases, **the court should attend with the parties and their advocates**, if any, and with much **each witnesses as may have to testify in that***

particular matter... When the court re-assembles in the court room, all such notes should be readout to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand, or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future [Emphasis added]."

Perhaps the most elaborate procedure is to be found in a rather persuasive authority in the decision of **Owole vs. Owole & 2 Others** (CIVIL APPEAL No. 0040 OF 2014) [2017] UGHCLD 1 (10 January 2017:ULII); where the High Court of Uganda identified the applicable law in the Republic of Uganda. It held:

"The procedures to be followed upon the trial court's visit to a locus in quo have further been outlined in Practice Direction No. 1 of 2007, para 3, as follows; -

- 1 Ensure that all the parties, their witnesses, and advocates (if any) are present.*
- 2 Allow the parties and their witnesses to adduce evidence at the locus in quo.*
- 3 Allow cross-examination by either party, or his/her counsel.*
- 4 Record all the proceedings at the locus in quo.*

5 Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary."

Mindful of the above position of law and guidance, on the 04th November, 2020, with the assistance of the parties, their advocates and witnesses, a visit to the locus in quo was conducted. At the site, PW2, DW1 and DW4, assisted with the identification of the beacons affixed in the plaintiff's farm. The identification of the beacons was guided by the Registered Survey Plan No. 45400 appended to the Certificate of Title, Exh. P.3. DW1 took us to his compound and identified his farm. A similar exercise was carried out by the 2nd and 4th defendants.

The evidence collected during the inspection also showed that the entire areas claimed by the 2nd and 4th defendants were outside of Exh. P.3. Specifically, the following observations were made:

- (a) That, the farm belonging to the 4th defendant drifted westwards of beacons marked by points ZBF896 and ZBF888, and therefore outside the plaintiff's farm which was drifting northwards from the identified points;
- (b) That, the 2nd defendants plot was also outside the plaintiff's farm, running westward and northward from beacons marked by points ZBF891, ZBF894 through to ZBF887. It

was also evidenced by a leave way which was still in existence, separating the plaintiff's farm to the east and DW2 to the west;

- (c) Part of the area claimed by DW1, the 1st defendant was located within the plaintiff's farm demarcated under the Certificate of Title, Exh. P.3. According to DW1 testimony, of the 10 acres he owned, seven (7) acres were within the plaintiff's allegedly title (Exh. P.3), and three (3) were outside the plot. It was also evident that DW1 lived within the plaintiff's farm;
- (d) The disputed land and the farms claimed by the defendants did not form part of the land allocated to PW2 (the 2nd defendant to the counter claim); and
- (e) Further to that, evidence at the inspection revealed that almost the entire farms belonging to the 3rd and 5th defendants were within the plaintiff's farm. Both the 3rd and 5th defendants did not testify in Court.

Having in mind the above extrapolation of facts and evidence, I will now address my mind to the determination of the issues as agreed by the parties. However, before delving into the

determination of the issues, I think it would be prudent at this stage to consider the admissibility of **Exhibits P.6** and **P.7** which were tendered by PW2 and tentatively admitted during trial. The practice to tentatively is not a new innovation. It has adopted by this Court in situations requiring acceleration of trials. See **M/S East West (1991) Investment Company Limited vs. Kappesh Sangar & Others** (Land Case No. 54 of 2015) [2018] TZHC 136; (29 July 2018).

In his testimony, PW2 sought to tender Exh. P6, a copy of the of the application letter dated 01st February, 2005 directed to Land Office Kisarawe District, requesting for processing of titles over the suit property. Following the prayer, Mr. Ruhanywa, learned counsel for the defendants objected to the tendering of the same on the ground that the document was secondary evidence and no notice had been issued in terms of section 68 of **the Evidence Act, Cap. 6 R.E. 2019**. Mr. Ngowi, counsel for the plaintiff insisted that the document was an original copy and should be admitted. I will not be detained much on this issue, I think, Mr. Ruhanywa's objection is meritorious. It is very clear that, on the face of it, the document is a photocopy, and no notice was issued in terms of section 68 of Cap. 6. Mr. Ngowi understands that, where a party intends to rely on secondary evidence a notice must be issued in terms of section 68. Being aware of that requirement, on 03rd October, 2019 the counsel filed a notice to produce and to rely on secondary evidence in relation to Exh. P.3, a certificate of title over the suit property. If

the counsel really intended to rely on the said exhibit, he should have complied with the requirements of the law, or at least demonstrated that the requirement for issuance of the notice in relation to the document is excluded under section 68 of Cap. 6. In that respect the document is not admissible and shall not be given consideration in determination of the present matter.

I will next consider the admissibility of exhibit P.7, a copy of the letter from Kisarawe District Council to this Court on the whereabouts of Mgeni J. Mgeni, a former employee of the Council. It is on record that, when PW2 sought to tender the letter, Mr. Ruhanywa objected to the tendering on the ground that the witness was not a competent person to tender the document. Admittedly, the letter purports to be directed to the High Court Land Division, however, no record or background on the letter or order requesting the explanations from Kisarawe District Council was presented before the Court. Further to that, it appears that, the letter was addressed to the Court and no copy was addressed to PW2. It is therefore clear that, the witness (PW2) was not the author or addressee of the said letter and neither did he establish in evidence the circumstances in which he came into possession of the document. He was, therefore, not a qualified person to tender the document. On that account, the objection raised by Mr. Ruhanywa is sustained and Exh. P.7 is expunged from the records.

In the first issue I am being asked to determine the question, as between the parties, who is the lawful owner of the suit

property. It is the trite law that in land matters where the land in dispute is a registered land the *prima facie* evidence to prove ownership is the title deed and the person vested with the duty to prove ownership is the registered owner. Under section 2 of **the Land Registration Act, Cap. 334 R.E. 2019** the term "owner": *"Means, in relation to any estate or interests the person for the time being in whose name that estate or interest is registered"*.

It is also trite that, the onus of proving that the land in dispute is a registered land is imposed on the plaintiff. This position was stated in **Godfrey Sayi vs Anna Siame as Legal Representative of the Late Mary Mndolwa**, Civil Appeal No. 114 of 2014 (CAT) (unreported) and **Salum Mateyo vs. Mohamed Mateyo** [1987] T.L.R 111. In **Godfrey Sayi vs Anna Siame** (supra) the Court of Appeal Stated:

"It is cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provision of section 110 and 111 of the Law of Evidence Act [Cap. 6 R.E. 2002] which among other things states:

110. Whoever desire any court to give judgment as to any legal right or liability depend on existence of facts which he asserts must prove that those facts exist

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."

Through the plaint and counterclaim, it is clear that, the Plaintiff and defendants have competing interests on the suit land, in that respect the person with a certificate of title will therefore be considered to be the lawful owner of the said property unless it is established in evidence that the said certificate was not acquired lawfully. This position was stated in **Amina Maulid Ambali & Others vs Ramadhani Juma** (Civil Appeal No.35 of 2019) [2020] TZCA 19; (25 February 2020) where the Court of Appeal, **Mwarija J.A** stated that:

"In our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained."

Further to that in **Leopold Mutembei vs. Principal Assistant Registrar of Titles, Ministry of Lands, Housing & Urban Development and the Attorney General**, (Civil Appeal No.57 of 2017) [2018] TZCA 213; (11 October 2018) the Court of Appeal, **Ndika J.A**, cited with approval the following excerpt from the book titled **Conveyancing and Disposition of Land in Tanzania** by **Dr. R.W. Tenga and Dr. SJ. Mramba**, Law Africa, Dar es Salaam, 2017 at page 330: -

"... the registration under a land titles system is more than the mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transaction that confer, affect or terminate that ownership or interest. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title." [Emphasis supplied]

In the present case, through the testimony of **PW1**, **PW2** and **PW3**, the plaintiff explained a chronology of events leading up to the issuance of the certificate of title. PW1 and PW2 testified that the suit property was part of their fathers' estate which was distributed the heirs upon his demise. It was their testimony that, the suit property was allocated to the plaintiff. Through **Exh. P.1** the Sungwi village council allocated the farm to the plaintiff, and other plots to his siblings. After the allocation, an application for survey and allocation was made to the Kisarawe District Council for survey and allocation of the suit property. A survey was conducted and upon its completion the applicant, PW1, was notified by a letter dated 04th November, 2006 (**Exh. P.2**). The survey was forwarded to the Ministry of Land for processing the titles. On 18th August, 2007, the title **Exh. P.3**, was issued to the plaintiff. The plaintiff's testimony on how she acquired her title was not shaken in evidence.

In view of the above analysis, I am satisfied that the plaintiff has been able to adduce the chronology of ownership of the disputed land and confirmed that the registration of her title was faultless and hence she was the lawful owner. I say so because the plaintiff has been able to establish, in evidence the state of ownership over the disputed land by presenting Exh. P.3, the certificate of title. See **Leopold Mutembei** (supra) at page 17. The plaintiff did not stop there, she went to provide evidence of the underlying transaction and process that conferred her title to the suit land.

In his defence, the 1st defendant (DW1) testified that his plot was allocated to him in 1985 by the village council. He said the farm was equivalent to 10 acres. To support his claim, he tendered **Exh. D.1**, a copy of minutes of the village council allocating him the suit land. Upon being allocated, he continued to enjoy possession until the intrusion by the plaintiff which resulted in filing a complaint with the village council. He tendered **Exh. D.2**, a copy of the decision of the village council. DW1 relied on Exh. D.1 and D.2 to insist that he was a lawful owner of the portion of the suit land.

Upon review of Exh. D.1, I have noted several issues. **One**, the minutes do not indicate that they were issued by the Sungwi Village Council because there is no title indicating the respective village to which they apply. **Second**, throughout the minutes it is not clear on the location or description of the land being discussed of being allocated, as such it is not clear whether the minutes

applied to the suit land. **Third**, the minutes were not signed by the secretary to the meeting who is the author. As such it could not be affirmed with certainty on the authenticity of the minutes. **Four**, a closer look of the minute shows that DW1, the applicant, was also part of the meeting. This is contrary to an ordinary practice where the applicant is not part or a member of a meeting that discusses his application. This raises doubts on the validity of the meeting. **Five**, **DW1** admitted that, during the period when the minutes were prepared it was necessary to have a party representative in the council. He also admitted that Exh. D.1 did not include the name of party representative. In absence of a party representative in the list of attendees the validity of the minutes becomes questionable. **Six**, the said minutes remained with DW1 for all the years, and he did not submit them to the District Land Authorities to process the title. In essence, the minutes are meant to be forwarded to the district for records and processing titles. Considering the above shortcomings, I am not convinced that this Court can rely on Exh. D.1 to establish DW1 ownership over his portion of the suit property.

I have also carefully examined the contents of Exh. D.2, the decision of the Village Land Council, dated 14th January, 2009, that purportedly confirmed DW1 ownership over the suit land. There are also several issues in placing reliance on the document. In the first place, the decision was issued in 2009, by that time the plaintiff had already been issued with a certificate of title over the suit

property. With a certificate of title in place, the jurisdiction of the village land council over the size and value of the of the suit property becomes questionable. That was, in itself, sufficient to disregard the document.

However, that is not the only shortcoming. It is in evidence that the complaint before the village council appears to be against the family of Elangwa Shaidi that is "Familia ya Elangwa" and it was brought by DW1 together with other people families. It is not clear whether the subject matter in the said complaint is analogous to the one in the present suit. further to that, it is not even certain what were the complaints for each of the complainant and what exactly was awarded to them. There was also no proof that the respondents in the said complain were summoned to defend themselves. Even so, the decision of the village council is not final, in terms of section 5, 6, 7 and 8 of **the Land Disputes Court Act, Cap. 216 R.E. 2019**, the role of the village council is to mediate the parties and an aggrieved party may prefer a suit to an appropriate forum based on the value and location of the subject matter. In the end, I do not think, Exh. D.2 is of any rescue to DW1.

During site visit it was observed that part of DW1 farm, an estimated 7 acres were within the plaintiff's farm and three (3) acres were outside the plaintiff land demarcated under the approved site plan attached to the certificate of title (Exh. P.3). On the basis of the above findings, without hesitant, I declare the

plaintiff to be the lawful owner of the suit property, occupied by DW1, found within the demarcated area by coordinates marked in the approved site plan attached to Exh. P.3. The uncontested area outside Exh. P.3 is the property of DW1.

DW4 testified in chief that 1983 he was allocated a piece of land by the Sungwi Village Government. In the same year he apportioned a piece of his farm to his son Paulo Wilfred Mdogo (DW2), the 2nd defendant. In his testimony DW2 testified that, in 2008 he sold a portion of his farm to Emmanuel Lakati herein referred to as DW3 or 4th defendant. DW3 tendered a copy of the sale agreement (Exh. D.5) he executed with DW2 over his portion of land. As observed during site visit, the farms or portions of land belonging to the 2nd and 4th defendants were located outside the demarcations and beacons marked in the approved survey plan attached to Exh. P.3. On the weight of evidence presented before the court, I am satisfied that the farms belonging to the DW2 and DW4 are outside the plaintiff's farm to the extent that they are outside the approved survey plan. The plots are thus the properties of 2nd and 4th defendants respectively.

As intimated above, the areas claimed by the 3rd and 5th defendants were located within the survey plan attached to Exh. P.3. Both, 3rd and 5th defendants did not appear in court to explain their claim of right or ownership over the suit land, in the circumstances the court was not presented with any material to gauge their defence. The only plausible explanation of their

absence in court was lack of legal claim over the property. Given that their areas are located with the plaintiff's land, I have no alternative than declaring the plaintiff a lawful owner over the respective areas.

In their counter claim filed together the WSD the defendants prayed for nullification of CT No. 77990. However, having ruled that the plaintiff has been able to prove that she is the lawful owner of the suit, I am unmoved by the defendant's contention that the plaintiff's title was fraudulently obtained. Further to that I am of the view that, if the defendants really intended to challenge the lawfulness of CT No. 77990 they should have joined the relevant authority which was responsible for registration of the plot in the name of the plaintiff. See **Amina Maulid Ambali** (supra).

All said and done, this court is satisfied that, in comparison with the defendant's evidence, the plaintiff's account of her ownership of the suit land is more cogent. I find the first issue in favour of the plaintiff to the extent explained above.

The second issued is who has trespassed into the suit property. The question stems from the fact that the plaintiff alleged that the defendants have trespassed into her land. Similarly, in their counter claim the defendants sought for a declaratory order that the plaintiff and PW2, her co-defendant to the counterclaim, were trespassers and hence they are liable for payment of Tshs. 50,000,000.

In **Jela Kalinga vs. Omari Karumwana** () [1991] TZCA 7; 09 May 1991 TANZLII) the Court of Appeal stated that:

"The foundation of an action for trespass to land is possession. It was decided in Delaney v T. P. Smith Ltd. [1946] 2 All E.R 23 that to maintain trespass against a wrongdoer it is not necessary that the plaintiff's possession should be lawful."

*"The case of Thompson v Ward [1953] 1 All E.R 1169 supports the proposition that anyone who was in possession or who is deemed to have been in possession at the time of the trespass could bring an action for trespass. ... However, one of the defences against an action for trespass is a claim by the defendant 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 (**Halsbury's Law England 3rd. Ed. Vol. 38** at page 749 paragraph 1226)." [Emphasis added]*

After examining the circumstances under which a claim of trespass may be maintained, the Court went on provide a general meaning of trespass. Specifically, the Court stated:

*"... a person is liable for trespass if he acts voluntarily knowing the nature and the quality of his act even though he does not know the act to be wrongful (See **Moriss v Marsden and Another** [1952] 1 All E.R. 925)."*

Further to that in **Frank Safara Mchuna vs. Shaibu Ally Shemdolwa** [1998] T.L.R No. 279 this Court defined "*trespass*" to mean:

"Intrusion upon land in the possession of another and the Defendant did intrude upon the land of the Plaintiff who under common law was in possession of the land. At common law there is a presumption that possession is always attendant to title and as the Plaintiff had title to the land it is presumed that he was in possession."

The Court went on to say that:

"The Defendant moved into the land and started development thereon after the accrual of the right of the Plaintiff over the land."

In the present case it was alleged that the defendants trespassed into the plaintiff farm in 2010. By this date the plaintiff had been issued with the Certificate of Title over the suit property. During evidence in court, which was confirmed during site visit, the 1st defendant farm was partly within the plaintiff's property. Similarly, it is in evidence that the 3rd and 5th defendants farm were completely within the plaintiff's property. It was also evident that the respective defendants have cultivated crops within the plaintiff's farm. Consequently, in terms of the guiding principles in **Jela Kalinga vs. Omari Karumwana** (supra) and **Frank Safara Mchuna vs. Shaibu Ally Shemdolwa** (supra) and considering the above set facts, I find that Sheila Elangwa had possession of

the suit land and the 1st, 4th and 5th defendants are trespassers into the plaintiff's farm.

On a similar note, I am convinced that the 2nd and 4th defendants are not trespassers over the suit land. Their portion of land had all along been in their possession and has never been in the plaintiff's possession. The 2nd and 4th defendants also proved to the satisfaction of the Court that the plaintiff invaded their farms and destroyed some crops. Their evidence was not shaken at any point. On the basis of that evidence, I am prepared to hold that the plaintiff trespassed into the 2nd and 4th defendants' farms.

For that matter, the counter claim by the defendants partly succeeds to the extent that the 2nd and 4th defendants are declared to be lawful owners of their respective pieces of land. Otherwise, the remaining claims in the counter claim are dismissed.

The final issue is to what reliefs are the parties entitled to. The plaintiff prayed for general damages; they did state a specific amount. In her testimony, PW1, stated prayed for compensation for being disallowed to develop her farm for 9 years by the defendant's occupation. She also prayed for compensation resulting from the defendant's trespass. Through their counterclaim, defendants prayed for Tshs. 50,000,000.00 compensation for trespass. It was not established in evidence how the defendants arrived at the above-mentioned amount. In their testimony and evidence, the 2nd and 4th defendants complained that the plaintiff

destroyed their crops. However, the cost and extent of destruction was not well established in evidence.

The law is clear that, this Court has discretion in awarding compensation or damages. In exercise of this discretion the court is enjoined to consider all the relevant factors and circumstances of each case. This view was stated in **Cooper Motor Corporation Limited vs Moshi Arusha Occupational Health Services** (1990) TLR 96. I am aware that trespass is actionable *per se*. I have considered the testimony presented during trial and the duration of intrusion made by the respective trespassers in the present suit. I have also considered the observations made during site visit as to the extent of cultivation made on the plaintiff's farm. It apparent that the plaintiff as well as the 2nd and 4th defendants have incurred some losses from the respective alleged invasion of their respective farms. Certainly, there are some forms of loss incurred because of the alleged trespass by the 1st, 3rd, and 5th defendants, as well as by the plaintiff, onto the 2nd and 4th defendants' farm. In the circumstances, I ward the plaintiff a minimal amount of Tshs. 10,000,000.00 in compensation as against the 1st, 3rd, and 5th defendants. In similar vein, the 2nd and 4th defendants are awarded a compensation to the tune of Tshs. 4,000,000.00.

In the final analysis, and for the reasons which I have endeavored to state above, I make the following orders:

- (a) That, the plaintiff is declared a lawful owner of a piece of land I identified under Certificate of Title No. 77990; L.O No. 198957 for Farm No. 3319 located at Sungwi Kisarawe District;
- (b) That, the 1st, 3rd and 5th defendants are declared as a trespasser to the land belonging to the plaintiff;
- (c) Consequently, the 1st, 3rd and 5th defendants is ordered to yield up vacant possession of the farm forming part of the suit property to the plaintiff;
- (d) That, the 1st defendant is also ordered to demolish all structures elected in the plaintiff's property;
- (e) That claims of trespass against the 2nd and 4th defendants have not been proved;
- (f) Consequently, the 2nd and 4th defendants are declared as lawful owners of their respective farms; and
- (g) The 1st, 3rd and 5th defendants shall pay the plaintiff compensation to the tune of Tshs. 10,000,000.00; and

(h) The plaintiff shall pay the 2nd and 4th defendants compensation to the tune of Tshs. 4,000,000.00.

In relation to costs, since the plaintiff succeeded in proving the case against the 1st, 3rd, and 5th defendants, I award her half of the costs as against the 1st, 3rd, and 5th defendants. In relation to the Counterclaim, the 2nd and 4th defendants are also awarded half of the costs.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of APRIL, 2021.




S.M. KALUNDE

JUDGE