

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 392 OF 2015

PIUS KUENGA PHILIP (suing as the Attorney

of ODDY PIUS MSIMBE) PLAINTIFF

VERSUS

1. SERIKALI YA MTAA WA MAKABE

2. GEORGE TARIMO

3. VENANCE MTEI

4. IBRAHIM MBAGA

5. MARIAM HUSSEIN

6. DEODATI PETER TARIMO

..... DEFENDANTS

JUDGMENT

S.M KALUNDE, J:

By a plaint dated 11th December, 2015, PIUS KUENGA PHILIP suing as an attorney of Oddy Pius Msimbe, filed the present suit against the defendants praying for *inter alia*:-

- (a) Declaration that the plaintiff is the lawful owner of the suit land measuring seven acres;
- (b) Declaration that the defendants are trespassers in the suit premises;
- (c) The defendants be ordered to demolish their structures/buildings from the suit land;
- (d) Interest on the principal amount at the rate of 12% per annum;
- (e) Costs of the suit; and
- (f) Any other relief this honourable Court may deem just and equitable to grant.

In support of the above prayers the plaintiff averred that he was the lawful attorney of one Oddy Pius Msimbe who was the lawful owner of the seven acres of land situated in Mbezi Makabe, Dar es Salaam (herein referred to as "**suit land**"). The plaintiff claimed that he acquired the suit land from one Salehe Olait in 1982 and has been in possession of the same ever since. He added that sometimes in 2006 the 2nd, 3rd, 4th, 5th and 6th defendants trespassed into the suit land, removed cement boundary poles, alienated portions of land and built houses. He alleged that, as a result of that of that trespass the plaintiff failed to utilize and develop land in a manner that will benefit the family. He lamented that despite numeral warning and notices the defendants refused to vacate the suit land and hence the present suit.

The plaintiff's claim is denied by the defendants vide a Written Statement of Defence (WSD) of the 1st and 4th defendants filed in Court on 14th June, 2017 and 18th February, 2016 respectively; and the joint written statement of defence of the 2nd and 6th defendants which were filed on 16th May, 2016. There was no defence from the 3rd and 5th defendants, consequently, it was ordered that the case proceeded **ex-parte** against them.

Together with their defence the 2nd and 6th defendants raised a preliminary objection on a point of law that the suit against them was time bared. The objection was not determined on merit since on 01st November, 2017, it was withdrawn on account that the same required evidence thus paving way for hearing of the case.

The Final Pretrial and Scheduling Conference was conducted on 18th June, 2018 and the following issues were agreed and framed for determination:

- (1). Who is the lawful owner of the disputed land measuring 7 acres located at Mbezi Makabe, Dar es Salaam;*
- (2). If the 1st issue is answered to the affirmative, then who is the trespasser to the disputed land; and*
- (3). To what reliefs are the parties entitled to.*

At the hearing the plaintiff retained the legal services of **Mr. Ndanu Emmanuel**, learned advocate whilst the 1st defendant was represented by **Mr. Noel Mangale**, a solicitor; **Mr. Julius Ndanzi** appeared for the 4th defendant and **Mr. Kelvin Kidifu** learned counsel represented the 2nd and 6th defendants.

The plaintiff, PIUS KUENGA PHILIP was the sole plaintiff witness. He testified as **PW1**. His testimony in chief was that the owner of the disputed land, one Oddy Pius Msimbe (Oddy), was his uncle who has been living in the United States since 1995. He tendered a copy of a Power of Attorney that authorised him to represent Oddy in prosecuting the suit. The power of attorney was admitted and marked as **Exhibit P.1**. He went to say that the disputed land was freely given to Oddy by one Salehe Olait in 1982. On being granted the piece of land Oddy paid Tshs. 225 being farming fees and Tshs. 90 contribution for a building. All the

payments were made to "*Serikali ya Kijiji cha Mbezi*" which issued a receipt witnessing of payment of the sum of Tshs. 315. It was his further testimony that upon payment of the fees a and over agreement was issued to him. He tendered a copy of the "*Hati ya Kupeana Shamba*" and a copy of the receipt No. 466576 which were admitted and collectively marked as **Exhibit P.2.**

Further to that the PW1 testified that in 1995 a dispute ensued between Oddy and Hussein Ramadhani, a caretaker of the farm. The dispute arose on obtaining reports that the said caretaker was erecting permanent structures on the disputed farm. The dispute was settled amicably. Subsequently, in 1997 the plaintiff obtained reports of permanent structures being built on the suit land, however they could not locate or identify individuals who had erected the said structures. He added that in 1999 they were informed that "*Serikali ya Kijiji*" had taken 3 acres of the disputed land. They went to the village chairman named Mr. Shomali who told them he was informed by Hussein Ramadhani that the farm had been abandoned. Further to that the chairman informed the plaintiff that another portion of the land was given to Mr. George Tarimo who had offered his land for expansion of a Primary School. On being informed of the developments Mr. Oddy agreed to offer his area to the village, however, in return he asked to be compensated. In accordance with the PW1 testimony no compensation or alternative plot was offered to Mr. Oddy.

PW1 added that in 2006 he filed **Case No. 192 of 2006** at the Mbezi Ward Tribunal against Hussein for the remainder of suit land. He tendered a copy of the proceeding and decision of the Mbezi Ward tribunal in Case No. 192 of 2006 which were admitted and marked as **Exhibit P.3**. He allegedly won the case. He further testified that, he could not file execution proceeding upon being advised that the ward tribunal had no jurisdiction to entertain the suit given the size and value of the suit land. Then in 2014 he issued Demand Notices to the trespassers. He tendered a copy of a Notice of Intention to Sue Makabe Local Government dated 16th December, 2014 which was admitted and marked as **Exhibit P.4**. He claimed the farm was not abandoned and added that the claims of abandonment were invented by Mr. Hussein to justify his trespass to the land. The plaintiff further testifies that Mr. Hussein had no title to pass to the defendants as he was not authorised by the owner. He concluded with a prayer that the orders sought be granted as prayed.

PW1's evidence in cross-examination was that the Mr. Oddy agreed to give the area to the "*Serikali ya Mtaa wa Makabe (SMM)*" which was under Kinondoni District by then. He also added that there was no formal communication on the offer to give the disputed land in exchange for allocation of a new plot. He said it was chairman of the Kinondoni DLHT who advised him that the ward tribunal had no jurisdiction and that he did not file execution proceedings.

On being cross examined by Mr. Kidifu, PW1 testified that he knew of the farm since they used to visit it with Mr. Oddy. He admitted that the "*Hati ya Kupeana Shamba*" and the copy of the receipt admitted and collectively marked as **Exhibit P.2** did not contain the description of the boundaries of the disputed area and nor did they contain the stamps of the SMM. He added that between 1995 and 2006 they used to visit and cultivate on the disputed land. In further cross examination by Mr. Ndanzi, the plaintiff reiterated that he saw the 4th defendant during the trial at the ward tribunal. He further admitted that **Exhibit P.2** did not contain the description of the boundaries of the disputed land.

In re-examination PW1 stated that the 3 acres given to SMM were given orally and that no formal arrangement or agreement was made. That concluded the plaintiff's case.

The first to step in defense was the 4th defendant, IBRAHIM MBAGA (**DW1**) his evidence chief was that he owned a piece of land equivalent to one (1) acre located at Mbezi Mkabe, Msumi Road, Ubungo Municipality which he bought from Mr. Hussein Ramadhani Mbala at the cost of Tshs. 450, 000 in the year 2000. The amount was paid in two instalments and the land was handed over to him. He presented a copy of the "*Hati ya Kuuziana Vitu Kijijini: Shamba, Nyumba, Kiwanja, Baisikeli, Radio, N.K*" dated 01st May, 2000. The same was admitted and marked as **Exhibit D.1**. upon purchasing the land, he erected boundaries and built servant quarters for his servants around 2001. Ever since then he has been

cultivating on the land. It was his testimony that there has never been any dispute over the area until the service of summons in relation to present suit in 2016.

In relation to Exhibit P.2, DW1 complained that the same did not contain the appropriate description of the area been handed over to the plaintiff. He also added that the document does not indicate the area of administration of the local leaders said to have witnessed the transaction. In his view the area been transacted was not identifiable and he did not know the same.

DW1 evidence in cross-examination was that, for a contract to be valid there must be signatures of the parties and that it was not necessary for the address to be included. He said that, before buying his portion of land, he confirmed ownership of Mr. Hussein from the neighbors in the area. In his further testimony he said that Mr. Hussein sold his entire portion of land and vacated the area. When cross-examined about Exhibit D.1, he disclosed that the same did not identify the village name or where it originated. He also added that the stamp on Exhibit D.1 did not indicate the respective city council being referred.

DW1 called two witnesses, the first was SHAIBU BAKARI JAMARDINI (**DW2**) his testimony was that he has been a resident at Mbezi Makabe since 1997 and had once been a ten-cell leader between 1997 and 2004. He alleged that the area was acquired by the village in 1999 as an abandoned farm which had not been cleared. He said at the time different uncleared areas were

confiscated by the village government, including the present location of "*Serikali ya Mtaa*" office and the primary school. In addition to that DW2 said that since its acquisition there has never been any dispute over the area. He prayed that the case be dismissed to allow construction of a health center.

In cross-examination he re-affirmed his position that the area was acquired by the SMM for construction of a health center. He also added that the acquired area was forest when acquired but admitted that there was no document or instrument to evidence ownership. It was his further testimony that the 2nd defendant was allocated the land upon surrendering his area to pave way for expansion of Makabe Primary School. There was nothing in re-examination.

The second witness paraded by the 1st defendant was Mr. ZUBERI ZAHORO ABDALLAH (**DW3**) a former chairman of SMM. In brief, he said that he was the chairperson between 2009 and 2014. He added that he was handed the three acres of land as part of the assets of the SMM. He added that the area was allocated for construction of a Health Centre. It was his further testimony that there has never been a dispute over the area until 2016 when the present case was filed.

In cross-examination he admitted that there was no any documentary proof that the disputed area belonged to SMM. He also confessed to know the plaintiff as the legal representative of

Mr. Oddy P. Msimbe. He said the area is bordered by Msumi Road, Street road and Mr. Madenge and Tarimo on the other side.

DW4, DEODATI PETER TARIMO was the last to take to the stand, he denied having trespassed into the plaintiff's land. His argument was that he came into possession of $\frac{3}{4}$ of the disputed land in 2000 after being compensated for relocating from his own plot that was acquired by SMM for expansion of Makabe Primary School. He tendered **Exhibit D.2** as evidence of the allocation of a piece of land to him by SMM. Ever since there was no dispute over the land until the present suit. In re-examination he said he was allocated the piece of land by SMM but admitted he was not aware of any meeting that did the allocation. He also admitted that Exh. D.2 did not contain the description of the area being passed on to him.

At the conclusion of the trial parties prayed to be allowed to file final submissions in support of their respective positions. The prayer was granted, and parties filed their submissions in accordance with the filing schedules ordered by the Court. I commend both parties for their endeavor in preparing their submissions. I will not reproduce the substance of the submissions; however, it suffices to note that the same have been considered in the composition of this judgment.

Upon consideration of the evidence presented in Court, and based on the submissions made by the parties, the Court sought it was convenient to conduct an inspection of the *locus in quo*. With

the aid of the parties and their respective counsels, on 16th November 2020, a visit to the locus in quo was conducted.

Through the above factual disposition, I think it is now worth directing my mind into the determination of the issues framed for determination.

The first issue framed for determination is who is the lawful owner of the disputed land measuring seven acres located at Mbezi Makabe, Dar es Salaam. At the outset I wish to state that in disposing the present case I will be guided by the rule of evidence that he who alleges has a burden of proof. This is in terms of **section 110 of the Evidence Act, Cap. 6 R.E. 2019**. I am also aware that in civil cases the standard of proof is on the balance of probabilities. This entails that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. See **Agatha Mshote vs Edson Emmanuel & Others** (Civil Appeal No.121 of 2019) [2021] TZCA 323; (20 July 2021 TANZLII).

It is settled law that parties are bound by their own pleadings and that a party shall not be allowed to depart from his pleadings to change its case from what was originally pleaded. This presupposes that a party should parade evidence to prove or support what he has pleaded. See **Agatha Mshote vs Edson Emmanuel & Others** (Supra). Mindful of that I will address my mind into the pleadings filed in relation to this case. The gist of the

plaintiffs claim of ownership over the suit property is to be found under paragraphs 5 and 6 of the plaint which reads as follows:

Paragraph 5:

*"That, the plaintiff's claim against the Defendants jointly and severally is for a Declaration that **the Plaintiff is the Rightful owner and occupier of land measuring seven acres located at Mbezi makabe, Dar es Salaam or whatever description may be given to the same piece of land** (herein referred to as the suit land), declaration that the defendants, their agents, lessees and servants are unlawfully trespassing over the plaintiff's suit premises. Further, the plaintiff claims Tshs. 500,000,000.00 as loss of use of the suit land and general damages to be assessed by the Court."* [Emphasis mine]

Paragraph 6:

"That, the plaintiff is the lawful owner of the suit which is located within the Makabe Mtaa after acquiring the same from one Salehe Ulaili way back in 1982 and thereafter paying necessary fees to the local authority.

A copy of the deed of handover and the receipt from the local authority are hereby appended and collectively marked as annexure OPM-2 leave of this Honorable Court is craved to form part of this plaint."

In accordance with the pleadings, the plaintiff alleges that he acquired the suit property upon being granted by Salehe Ulaiti in 1982. In his oral testimony, PW1 testified that the disputed land was freely given to Oddy Pius Msimbe by one Salehe Olaiti in 1982. On being granted the piece of land, Mr. Oddy paid various fees and contributions to SMM. PW1 alleged that, upon payment of the fees and contributions a handover agreement was issued to him. A copy of the handover agreement and receipts were tendered as **Exh. P.2**. According to PW1, in 2011, the said Mr. Oddy who is since the resident of the USA, executed a general power of attorney (**Exh. P.1**) granting him, *inter alia*, the powers to prosecute the present case.

The handover agreement ("HATI YA KUPEANA SHAMBA") content of Exh. P.2 provides as follows:

"9/12/82

HATI YA KUPEANA SHAMBA

Mimi Salehe Ulaiti nimetowa shamba langu lenye ukubwa wa ekari saba. Nimempa ndugu Oddy Pius Msimbe alime mali yake kabisa.

Nimempa yeye ni mwanangu hatudaiani chochote.

Sahihi ya mtowaji (sgd)

Mpokeaji (sgd)

Sahihi ya mjumbe (sgd)

Mwenyekiti wa zoni (sgd)

1. Shahidi Abdallah Yawela.... (sgd)

2. *Shahidi Rashid Salum..... (sgd)"*

No further evidence was offered as to the description of the suit property, not in the receipts or in PW1's testimony. The plaintiff placed heavy reliance on the "*Hati ya Kupeana Shamba*" comprised Exh. P.2 as evidence of the transaction giving him ownership over the suit property. In a nutshell Exh. P.2 leaves a lot to be desired. As it may gleaned, neither the "*Hati ya Kupeana Shamba*" nor the attached receipts stipulate the description of the land or property being offered to the said Oddy Pius Msimbe. The documents are not stamped. When he was cross examined on whether Exh. P.2 offered any description of the suit property, PW1 conceded that there was description of the location or boundaries of the suit property on the alleged document. He stated that:

"The "Hati ya Kupeana Shamba" does not show where the area is and what are the boundaries."

During site visit, PW1 attempted to provide a description of the property by indicating the boundaries of what he believed to constitute the suit property. The alleged description did not match his testimony or evidence presented during trial. The requirement to provide a sufficient description of property is a statutory requirement provided for under Order VII Rule 3 of **the Civil Procedure Code, [Cap. 33 R.E. 2019] (CPC)**. The mandatory requirement under the above section is also reflected in Order XX Rule 9 of the CPC relating to the content of a decree for recovery

of an unmovable property; and Order XXI Rule 11 and Order XXI Rule 12 of the CPC both to attachment of immovable property.

The requirement to describe the suit property in the CPC is not a cosmetic one; **first**, it allows the Court to establish its jurisdiction through identification of the location of the suit property. **Secondly**, the description is also meant to inform the defendant of the case he is meant to defend against so that he can offer a plausible defense to the allegations. **Thirdly**, and probably most importantly, the description is meant to afford the Court with an opportunity to pass final and definite orders. In absence of a sufficient description of the property no Court would issue executable decrees.

Perhaps, there are no better ways describe the importance of description of property than the persuasive statement of the Orissa High Court, of India in In **Bandhu Das and Anr. vs Uttam Charan Pattanaik**, AIR 2007 Ori 24, 2006 II OLR 80. In the said case the Indian High Court was interpreting **O. VII R. 3 the Indian Civil Procedure Code**, which is *pari materia* to our O. VII R. 3, of the Civil Procedure Code, the Orissa High Court had this to say:

"A bare reading of the above provision makes it is crystal clear that what exactly the land or the area over which the dispute exists is a question which goes into the root of the matter relating to subsistence of the case. In absence of such description in the plaint or supply of the map by annexing the same to the plaint and the

*evidence to the above effect, no Court would pass a decree, as such a decree would be inexecutable or would be rendered otiose. **Even if the Court finds that the plaintiff had title and possession in respect of the suit land, in absence of proper description, as mentioned in Order 7 Rule 3, C.P.C., the decree cannot be executed... In view of the above, this Court feels that the decree is not executable, and the suit is incompetent for want of proper description and sufficient identification.***”
[Emphasis added]

Since the plaintiff has failed to provide a sufficient description of the property, the subject of this suit, the resultant effect is that he has also failed to prove ownership of the suit land. On the way forward, I find no better guidance than the instructive decision of the Court of Appeal in **Agatha Mshote vs Edson Emmanuel & Others** (Supra) where the Court (**Mugasha, J.A**)

"In view of what we have endeavoured to discuss, the appellant failed to prove her case on the balance of probabilities and it cannot be safely vouched that she had discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges that burden, as earlier stated, the weakness of the respondents' case, if any, cannot salvage the plight of the unproven appellant's case. In our

considered view, we agree with the manner in which the trial Judge addressed the second issue as to whether the respondents' had trespassed into the land in disputed. We are fortified in that account because since the burden of proof was on the appellant and not the respondents, and in the event she did not discharge the onus, the credibility of the respondents' account was irrelevant."

For the above reasons, this Court is satisfied that the plaintiff has failed to prove that he is the lawful owner of the suit land. Responding to the remaining will consequently be academical. That said, the suit is dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 19th day of JANUARY, 2021.



A handwritten signature in blue ink, appearing to read "S.M. Kalunde", is written over the printed name.

S.M. KALUNDE

JUDGE