

IN THE HIGH COURT OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND CASE NO. 7 OF 2015

OLIVER GERVAS NGOLLE1ST PLAINTIFF
ESTER GERVAS NGOLLE.....2ND PLAINTIFF
JAMES LEONARD NGOITANILE.....3RD PLAINTIFF
DORICE GERVAS NGOLLE.....4TH PLAINTIFF
STANLEY RICHARD NGOLLE.....5TH PLAINTIFF
JULIANA GERVAS NGOLLE.....6TH PLAINTIFF
JUSTINA GERVAS NGOLLE.....7TH PLAINTIFF
MARCUS JOHN NGOLLE.....8TH PLAINTIFF

VERSUS

JUMA HASHIM GONGA.....1ST DEFENDANT
OMAR KIPITA.....2ND DEFENDANT
ADRIANO MINJA.....3RD DEFENDANT
YUSUF SHABAN MKELEGE.....4TH DEFENDANT
ABDU YUSTI NGUMBE.....5TH DEFENDANT
FELIX MLIGO.....6TH DEFENDANT

JUDGMENT

Date of Final Submissions: 22/06/2022

Date of Delivery: 12/08/2022

AMOUR S. KHAMIS, J:

Oliver Gervas Ngolle, Ester Gervas Ngolle, James Leonard Ngoitanile, Dorice Gervas Ngolle, Stanley Richard Ngolle, Juliana Gervas Ngolle, Justina Gervas Ngolle and

- Marcus John Ngolle are beneficiaries of the estate of the late Gervas John Ngolle who died on 30 October 2008.

Upon death of Gervas John Ngolle, his brother Marcus John Ngolle, applied for and was granted letters of administration of the estate by the Buguruni Primary Court vide Administration Cause No. 326 of 2008.

Having duly administered the estate, Marcus John Ngolle distributed the deceased's properties amongst heirs and other beneficiaries.

Among others, the late Gervas John Ngolle allegedly owned a 31.9 acres of land in Kiharaka area, Bagamoyo District, Coast Region.

In the year 2012, Oliver Gervas Ngolle, Ester Gervas Ngolle, James Leonard Ngoitanile, Dorice Gervas Ngolle, Stanley Richard Ngolle, Juliana Gervas Ngolle, Justina Gervas Ngolle and Marcus John Ngolle, hereinafter to be collectively referred to as the plaintiffs, surveyed the 31.9 acres of land and obtained 32 plots which were allocated amongst themselves.

Between April and May 2014, the plaintiffs were issued with certificates of title in respect of the 32 plots of land. The present suit was instituted on 28 December 2015.

According to the Plaint, the plaintiffs' claim against the defendants is for declaratory orders that the defendants trespassed into the 32 surveyed plots, namely: Plots Nos. 1 to 32, Block "P", Kiharaka in Kerege Urban area, Bagamoyo District.

The plaintiffs also moved the Court for an order of demolition of structures erected by the defendants on the disputed plots and for an order of vacant possession from such land.

It was alleged that the defendants were aware of a survey carried on the suit land and of the allocation of the surveyed plots to the plaintiffs.

It was further alleged that despite of such knowledge, in the year 2013, the defendants trespassed into the surveyed plots and erected temporary and permanent structures thereon.

The plaintiffs pleaded that despite of concerted efforts in requiring the defendants to vacate, none of them was prepared to leave hence institution of the suit.

Juma Hashim Gongga, Omar Kipita, Adriano Minja, Abdu Yusti Ngumbe and Felix Mligo filed a Joint Written Statement of Defence.

Apart from the general denial, Adriano Minja and Abdu Yusti Ngumbe averred that they lawfully own the disputed premises having acquired them by way of purchase from one Hassan Mpanduka way back in the years 1997 and 1998 respectively.

Juma Hashim Gongga, Omar Kipita and Felix Mligo averred that each of them lawfully owned the disputed land and their ownership was grounded on traditional occupation and possession under customary deemed rights in land.

As regards to the plaintiffs' certificates of title, the first, second, third, fifth and sixth defendants stated that the same were issued subsequent to their (defendants) ownership and cannot override and extinguish defendants' rights over the suit premises.

Upon production of a copy of Mwananchi Newspaper dated 22 September 2017 which published a summons in respect of the case, this Court on 18 February 2022 made an order for *ex parte* proof against the fourth defendant, Yusufu Shabani Mkelege who neither entered appearance nor filed a Written Statement of Defence.

In a Reply to the Joint Written Statement of Defence, the plaintiffs stated that Adriano Minja and Abdu Yusti Ngumbe could not purchase the disputed land from Hassan Mpanduka who did not own it and had nothing to pass by way of sale.

In a further reply, the plaintiffs stated that Juma Hashim Gongga, Omar Kipita and Felix Mligo cannot own the disputed land under customary deemed right of occupancy since that land is surveyed with certificates of title.

Further, the plaintiffs averred that the defendants had no legal rights over the disputed land as the survey complied with all requisite procedures.

It was further averred that at the time of survey the defendants had not yet trespassed into the disputed lands.

Upon completion of pleadings, the suit went through mandatory legal procedures under Order VIII of **THE CIVIL**

PROCEDURE CODE, CAP 33, R.E 2019 as amended by **THE CIVIL PROCEDURE CODE (AMENDMENT OF THE FIRST SCHEDULE), GN No. 381 OF 2019**, namely first pre - trial conference, mediation and final pre – trial conference.

At the final pre – trial conference, three (3) issues were recorded for determination, namely:

- 1) *Whether or not the plaintiffs are the rightful and lawful owners of the suit land.*
- 2) *Whether the defendants are trespassers on the suit land*
- 3) *To what reliefs are the parties entitled to?*

Trial started on 13 June 2022 and concluded on 22 June 2022 inclusive of dates for filing written submissions.

In line with Rule 2 of Order XVIII of **THE CIVIL PROCEDURE CODE** as amended by **THE CIVIL PROCEDURE CODE (AMENDMENT OF THE FIRST SCHEDULE) RULES, 2021, GN No. 760** published on 22 October 2021, evidence in chief was given through witness statements.

A total of four (4) witnesses for the plaintiffs and eight (8) witnesses for the defendants testified. Twenty three (23) exhibits in support of the plaintiffs’ case and five (5) exhibits for the defendants’ case were produced and admitted.

Throughout trial, the plaintiffs were represented by Mr. Daibu Kambo, learned advocate. Mr. Dominicus Nkwera, learned advocate of this Court, acted for the defendants.

At the conclusion of trial, parties filed written submissions that were well researched and organized. I commend the rival counsel for their spirited arguments.

Relevant parts of the submissions will be referred to in the course of addressing the issues on record.

The first issue is whether the plaintiffs are rightful and lawful owners of the suit land.

Whereas throughout trial Mr. Kambo represented the eight (8) plaintiffs in this case, the final submissions were made only for the second, third, sixth and eighth plaintiffs. No explanations were given for omitting the other plaintiffs.

In support of the first issue, Mr. Kambo referred to testimonies of PW 1, PW 2, PW 3 and PW 4 and contended that the plaintiffs managed to prove ownership of the suit plots.

He contended further that genesis of the suit land was established and the certificates of title were admitted in evidence.

On the other hand, Mr. Dominicus Nkwera, learned advocate for the defendants, contended that the plaintiffs failed to prove ownership over the disputed land.

He faulted the plaintiffs for failure to plead history on ownership of the disputed land particularly as regards to earlier ownership before Selemani Rajabu, Rashid Hassan Mohamed, Salima Mshamu, Omari Saidi, Mohamed Ali and Maneno Masanja who allegedly sold parcels of land to the late Gervas John Ngolle in the year 1992.

The defendants' counsel questioned as to why the plaintiffs failed to lead evidence proving that the defendants trespassed onto the disputed land in the year 2013.

Further, Mr. Nkwera wondered as to why the plaintiffs did not lead evidence regarding persons who witnessed sale agreements between the late Gervas John Ngolle and the different persons who allegedly sold land to him.

The learned advocate asserted that the plaintiffs' failure to present witnesses to the sale agreements was illustration of a failure to prove the case.

The defendants' counsel strongly attacked Exhibits P 17, P 18, P 19, P 20, P 21 and P 22, sale agreements between the late Gervas John Ngolle and various individuals who allegedly sold some parcels of land to him for failure to indicate location and boundaries of the land sold.

In **SILVER GENERAL DISTRIBUTORS & KUMBURU SISAL ESTATES LTD V JAFARI HUSSEIN SINAI & FARAJI FADHIL, HIGH COURT OF TANZANIA AT TANGA, LAND CASE NO. 6 OF 2013** (unreported), this Court at page 22 of the typed Judgment listed down the manner of proving land ownership in a suit like this, thus:

"It is trite law settled through a long line of cases that ownership to land can be proved in one or more of the following five ways: i) traditional or customary evidence ii) production of documents of title iii) acts of ownership and possession by a person such as selling,

leasing, renting, farming on all or part of the land iv) acts of long possession and enjoyment of land v) by proof of probability under the evidence act such as proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land, would, in addition, be the owner of the land in dispute.....”

According to the Plaintiff and the evidence on record, until the year 2012, the disputed land was unsurveyed. The survey was allegedly carried by the plaintiffs in the year 2012.

As stated by PW 1 Ester Gervas Ngolle, PW 2 James Leonard Ngoitanile, PW 3 Juliana Gervas Ngolle and PW 4 Marcus John Ngolle, prior to survey, the disputed land was owned by the late Gervas John Ngolle who died on 30 October 2008.

PW 1 Ester Gervas Ngolle testified that prior to his death, the late Gervas John Ngolle had acquired a 31.9 acres located at Kiharaka, Bagamoyo District, Coast Region through purchase from various individuals.

In order to prove ownership of the late Gervas John Ngolle over the disputed land, PW 4 Marcus John Ngolle, tendered in evidence exhibits P 17, P 18, P 19, P 20, P 21 and P 22.

Exhibit P 17 is a sale agreement between the late Gervas John Ngolle and Selemani Rajabu dated 27 December 1992. Exhibit P 18 is an agreement between

Gervas John Ngolle and Rashid Hassan Mohamed dated 1 November 1992 while Exhibit P 19 is a sale agreement between Gervas John Ngolle and Salima Mshamu.

Exhibit P 20 is a sale agreement between Gervas John Ngolle and Omari Said dated 1 November 1992.

Exhibit P 21 is a sale agreement between Gervas John Ngolle and Mohamed Ali dated 1 November 1992.

The last document in the series is Exhibit P 22, a sale agreement between Gervas John Ngolle and Maneno Masanja dated 23 May 1993.

The question is whether these documents entitled the late Gervas John Ngolle to ownership of the disputed parcel of land.

I have carefully examined these six (6) exhibits which for no apparent reasons were not pleaded in the Plaint. They were all prepared in one standard computer generated format which left some blanks to be filled in with ink of a pen.

The standard template reads:

"HATI YA MAUZIANO YA SHAMBA

Leo hii siku ya tarehe

Mimi..... wa S.L.P.....

kwa hiari yangu mwenyewe na kwa makubaliano ya wahasika wengine, nimeamua kumuuzia Mr. Gervas J. Ngolle wa S.L.PDar es Salaam shamba langu lenye ukubwa wa karibu ekariza kukasimia, kwa Jumla ya Shilingi

.....(Shs.....) ambazo amenilipa zote.
Mimi.....(Muuzaji) nitawajibika kwa kero au
bughudha yoyote itakayotokea kwa sababu ya
mauziano ya shamba hili. Nitalipia gharama zote
zita kazoletwa na kero au bughudha hiyo.

Na mimi Gervas J. Ngolle nakubali kuwa mmilikaji
halali wa shamba hilo.

Sahihi ya Muuzaji

.....

Sahihi ya Shahidi wake

.....

Sahihi ya Mnunuzi

.....

Shahidi wake

.....

Mauziano haya yamekubaliwa na kuthibitishwa na
CHAMA CHA MAPINDUZI YA

Sahihi ya Mwenyekiti wa Chama.....

Jina.....

Anwani.....

Tarehe.....

Sahihi ya Katibu Kata.....

Jina.....

Anwani.....

Tarehe.....”

Based on that standard template, some particulars
were filled in.

In Exhibit P 17, the day for the agreement was Sunday, 27 December 1992. The seller was Selemani Rajabu of P.O. Box 94 Bagamoyo. The size of land was three (3) acres and sale price Tshs. 80,000/=.

The witness for the seller was Rashid Saidi (Mjombake) and buyer's witness was W. Mapigano.

In Exhibit P 18, the seller was Rashid Hassan Mohamed of P.O Box 94 Bagamoyo. The agreement was allegedly executed on a Sunday of 1 November 1992. The Size of land was 3.5 acres and price being Tshs. 70,000/=.

Witness for the seller was Jafari Kiriti and seller's witness was Dr. B. L. Kikusange.

Exhibit P 19 show name of the seller as Salima Mshamu, size of land three (3) acres and price was Tshs. 70,000/=. Date of alleged execution was 15 November 1992.

Seller's witness was Ali Nasoro and buyer's witness did not write his name but signed the document.

Exhibit P 20 was allegedly executed on Sunday, 1 November 1992 between Gervas Ngolle and Omari Said of P.O. Box 94 Bagamoyo. Size of land is four (4) acres sold at Tshs. 80,000/=.

The seller's witness was Jafari Kipita and buyer's witness was Dr. B.L Kikusange.

Exhibit P 21 was equally executed on Sunday of 1 November 1992 between Gervas Ngolle and Mohamed Ali of P.O. Box 94 Bagamoyo. Land size is one (1) acre sold at Tshs. 30,000/=

The seller's witness was Jafari Kipita and buyer's witness was Dr. B. L. Kisusange.

Exhibit P 22 was allegedly signed on Sunday of 23 May 1993 between Gervas Ngolle of P.O Box 268 Dar es Salaam and Maneno Masanja. The size of land is five (5) acres sold at Tshs. 170,000/=.

The seller's witness was Yahaya S. Ngunga. Neither name nor signature of the buyer's witness were written.

In all the six (6) documents, there are blank spaces for an appropriate CCM ward, names and signature of the CCM chairman for the relevant ward, address and date.

There was also a blank space for the names and address of the Ward Executive Officer, address and date.

For no apparent reasons, all these particulars were not supplied.

Apart from those missing particulars, the forms did not indicate location of the land allegedly sold. Neither a hamlet, street, village, ward, district nor a region in which the sold land is situate were given.

It is trite law that where the intention of the parties has been reduced to writing, it is generally not permissible to adduce extrinsic evidence, whether oral or in writing, either to show that intention, or to contradict, vary or add to the terms of the agreements or documents.

According to the **HALSBURY'S LAWS OF ENGLAND, 3RD EDITION, VOLUME 11**, Paragraph 646 and 649, this rule applies generally in all cases where the agreement

between the parties is in fact reduced into writing and, apart from proceedings for discretionary remedies such as rectification, rescission or specific performance, the rule is of equal force in equity as at law.

If one reads the six (6) documents, Exhibits P 17, P 18, P 19, P 20, P 21 and P 22, he/she cannot tell as to where the agreements were executed and or establish location of the respective parcels of land allegedly sold.

Further to that, the immediate neighbours to the land allegedly sold were not identified.

In such circumstances, is it safe for this Court to assume that the late Gervas John Ngolle bought the disputed parcels of land located in Kiharaka area, Bagamoyo Township?

In **ABELLA BERTHA VIDTFELDT V THE REGISTERED TRUSTEES OF THE CONGREGATION OF THE HOLY GHOST FATHERS AND ROMAN CATHOLIC CHURCH DIOCESE OF MOROGORO, HIGH COURT OF TANZANIA, LAND DIVISION, LAND CASE NO. 2 OF 2015** (unreported) this Court referred to its earlier decision in **MBUMBUMBU NGWALE V ALI SAIDI KIDOWE, PC CIVIL APPEAL NO. 12 OF 1992, HIGH COURT OF TANZANIA, DAR ES SALAAM DISTRICT REGISTRY** (unreported) wherein Mkude, J (as he then was) held that:

".....In cases involving trivial claims to a shamba it is always advisable to hear evidence of those who own adjacent pieces of land since they are the people

best placed to see over the years who their neighbor is.....”

In the present case, Exhibits P 17, P 18, P 19, P 20, P 21 and P 22 explicitly showed names of the sellers and witnesses for the parties (sellers and the purchaser/buyer). However, none of these witnesses was called on to testify.

Assuming that the named witnesses were not available, the plaintiffs did not lead any evidence to show their unavailability.

Furthermore, no evidence was led by the plaintiffs in respect of the neighbours to the disputed parcels of land who, in my view, could tell this Court as to who was their actual neighbor throughout the period of thirty (30) years from 1992 to 2022.

On the other hand, the defendants testified against validity of sellers' names indicated in the sale agreements. DW 1 ABDU YASIN NGUMBE, for instance, went on record that:

“9. Moreover according to what called sale agreements by the plaintiffs those names appeared as the sellers never lived or owned a piece of land in that land in dispute by any means. And also the plaintiffs in their evidence stated facts which they never pleaded by any means for instance no any allegation that the land in dispute belongs to any deceased or them, no any fact in their pleadings how they acquired a disputed land.”

The same attack was repeated by DW2, DW3, DW4, DW5, DW6, DW7 and DW8.

In *PETERSON GUTU ONDIEK V DANIEL NJIGUA GICHOHI, CIVIL CASE NO. 4018 OF 1990* (unreported), the High Court of Kenya held that where evidence exists and the same is not adduced in Court, the Court may presume that it is unfavourable to the party withholding it.

In the present matter, apart from failure to cause appearance of the material witnesses, none of the plaintiffs' four witnesses informed this Court as to why some important particulars were not filled in Exhibits P 17, P 18, P 19, P 20, P 21 and P 22.

There is no doubt that if such particulars were supplied, the whereabouts of the land allegedly bought by the late Gervas John Ngolle would not have been an issue.

In the upshot, going by the evidence on record, the plaintiffs did not sufficiently convince this Court that the relevant transactions dating as far back as 1992 and 1993, related to the disputed parcels of land.

The second issue is whether the defendants are trespassers on the suit land.

A trespasser is someone entering someone's land or property without permission.

Mr. Kambo asserted that none of the defendants was able to establish validity of their alleged ownership.

The learned advocate made reference to the evidence of DW 2, DW 3, DW 4, DW 5, DW 6, DW 7 and attacked Exhibits D 2, D 3 and D 4 on grounds of authenticity.

In totality, the plaintiffs' advocate submitted that the defendants have no justification for claiming ownership over the disputed land.

He invited this Court to find the defendants were trespassers.

On the other hand, Mr. Dominicus Nkwera contended that the defendants disapproved the plaintiff's case and led evidence to show that they legally owned the disputed land.

It is on record that eight (8) witnesses testified for the defendants.

DW 1 ABDU YASIN NGUMBE, a carpenter, resident of Tungutungu Mapinga, Bagamoyo, testified that on 17th March 1998, he bought a parcel of land from Hassan Mpanduka Kodibado for Tshs. 70,000/=.

He said the land measured twenty (20) paces by forty (40) paces length.

The witness said he developed the land by building a house, cultivating temporary and permanent crops like banana and mango trees as well as cassava.

He identified his land with borders, thus: Mr. Komba (South), a road (North), Adrian Minja (East) and Mr. Mlawa (West).

Regarding occupation of the disputed land, the witness stated:

"7. That what (was) stated by the plaintiffs in their pleadings and their evidence that the defendants invaded the land in dispute from 2013 is not realistic as clearly stated above and I stayed there in the land in dispute since 1998 till now.

8. However in that land in dispute there is an office of Tungutungu Local Government since 1998 it is there and also there are cemetery in that land in dispute."

DW 1 further testified that the defendants were just a small fraction of the total population occupying the disputed land. Particularly, he said that:

"11. That from 1998 till 2011 the land in dispute has more than three hundred populous and I wonder why the plaintiffs decided to sue only 6 defendants/populous though they knew the directness of the disputed land."

On cross examination by Mr. Daibu Kambo, DW 1 said he bought the disputed land from Hassan Mpanduka Kodibado who proved to him that he owned 13 acres of land.

On further cross examination, the witness said that:

"If I recall well, he bought that land from the family of Kipita. Hassan Mpanduka Kodibado is alive and promised to come and testify in this case...."

On re – examination by Mr. Dominicus Nkwera, DW 1 described other structures found in the disputed land, thus:

“I understand that the graveyard is under custody of the Kipita family and the Hamlet Council Office is owned by the Government. I am not aware as to how they got those parcels of land.

I do not know in which plots the graveyard and the Hamlet Council Office lies.”

DW 2 ADRIAN MARCEL MINJA, a resident of Mapinga Tungutungu, Bagamoyo and a third defendant herein, said he bought a parcel of land measuring twenty (20) by forty (40) paces from Hassan Mpanduka Kodibado on 20 April 1997.

He developed that land by erecting a house and carried cultivation for both permanent and temporary crops for the last twenty (25) years.

He identified his land as bordering Hassan Mpanduka (South), Sijali Mohamed (North), Hashimu Mfinanga (East) and Hassan Mpanduka (West).

The witness testified that he has been in occupation of the disputed land from the year 1997 and not 2013 as alleged by the plaintiffs.

He strongly challenged names of purported sellers in the sale agreements (Exhibits P 17 to P 22 inclusive) and said such individuals never lived close to or owned any parcel of land at the locality.

DW 2 added that the disputed land was populated by more than three hundred (300) persons and wondered why the plaintiffs picked only six (6) defendants to sue.

On cross examination by Mr. Daibu Kambo, DW 2 said there are cemeteries and office of the Hamlet Council in the disputed land.

On re - examination by Mr. Dominicus Nkwera, the witness said he could not know as to which of the surveyed plots accommodated the cemeteries and office of the Hamlet Council on the ground that he did not examine the certificates of title.

DW 3 FELIX KASSIAN MLIGO, the sixth defendant herein and a resident of Mapinga Tungutungu, stated that he settled at Tungutungu Mapinga in the year 2009.

The witness is a husband to Mwanaisha Jafari Kipita @ Jafari Mbwana Kupita.

On examination in chief, he said that his wife was given the disputed land as a gift by her late father in the year 2004.

The witness described the land as measuring twenty five (25) by forty (40) paces and bordered by a road (South), road (North), Ally Bakari (West) and Mama Muhenga (East).

He said that he and his wife developed the land by erecting a house and planted both permanent and temporary crops.

DW 3 said for almost sixteen (16) years of peaceful occupation of the disputed land, his family was not disturbed at all.

He said the disturbances started in the year 2012 leading to the present suit.

On further examination, the witness traced the history of ownership to the year 1985 when his late father in law, Jafar Mbwana Kipita settled at Tungutungu. Earlier on, he lived at Mnazi Mmoja Mapinga, Bagamoyo.

He added that upon settlement, on 10 July 1985, his said father in law was allocated a parcel of land at Tungutungu measuring twelve (12) acres which forms part of the disputed land.

The witness said Jafar Mbwana Kipita was not the only person allocated with a parcel of land at the area. Disclosing names of other allocatees, the witness said:

“5. There are many people given a piece of land at Tungutungu among them were my wife known as Mwanaisha’s father as mentioned above, Hashim Said Kipita and Said Amir Kipita on 10th July 1985 and they were given in documentation..”

The witness added that the disputed land was populated by more than 300 persons and among others, accommodated a grave yard for the Kipita family and office of the Tungutungu Local Government (Hamlet).



On cross examination by Mr. Daibu Kambo, the witness insisted that the disputed land was given to his wife Mwanaisha Jafar Kipita as a gift by her late father.

DW 4 JUMA HASHIM GONGA, a resident of Mapinga Tungutungu and current Chairman of Mapinga Suburb, said he was one of the children of the late Hashim Said Kipita.

He stated that his family initially lived at Mnazi Mmoja area, Mapinga, Bagamoyo but upon sale of their land to an investor in 1985, relocated to Tungutungu area, Mapinga Bagamoyo where the disputed land is situate.

The witness said his father was one of the residents of Mnazi mmoja whose land was compensated by allocation of parcels of land at Tungutungu on 10th July 1985.

He named other former residents of Mnazi Mmoja given new parcels of land at Tungutungu on 10 July 1985 as: Jafari Mbwana Kipita @ Jafari Mbwana Kupita and Said Amir Kipita.

On further examination, DW 4 said his late father, Hashim Said Kipita, was allocated 13 acres of land at Tungutungu which forms part of the disputed land.

Upon attaining 13 years old, DW 4 was given a parcel of land measuring three (3) acres by his late father in accordance to the Ngindo customs.

DW 4 said the transmission of the land from his father to him was orally made but witnessed by one Haji Kipita.

He identified boundaries of such land as a road

(South), Hashim Said Kipita (North), Hamis Luyaya (West) and Yassin Kipita (East).

The witness said a portion of land given to him was subsequently sold to various individuals and he retained a parcel measuring forty (40) by forty (40) paces in which he built a house and planted permanent and temporary crops.

On further examination, DW 4 said since he assumed possession of the disputed land in 1994, there was no disturbance for almost 16 years until 2012 when the plaintiffs initiated the present dispute.

Regarding documentation of the land in dispute, DW 4 said around the year 1985, a meeting of the Kipita clan was convened at Tungutungu Mapinga, Bagamoyo and resolved to entrust him with custody of the valuable items such as documents on land ownership issued by the Mapinga Village Council.

The witness said he was also given custody of the clan cemeteries located at the disputed land.

DW 4 strongly refuted plaintiffs' claims that the defendants invaded the disputed land in the year 2013 and insisted that personally, he was on that land since the year 1985.

The witness confirmed that office of the Tungutungu Hamlet Council was housed in the disputed land from the year 1994.

In further testimony, DW 4 said names of people appearing in Exhibits P 17 to P 22 inclusive are not known to residents of Tungutungu Mapinga, Bagamoyo, for they never lived or owned any parcel of land around the area.

He added that the disputed land accommodated more than 300 persons including children of the late Said Amir Kipita who was allocated the same by the Village Council in the year 1985.

On cross examination by Mr. Daibu Kambo, the witness persevered that the disputed land was allocated to the three Kipita brothers: Jafar Mbwana Kipita, Hashim Said Kipita and Said Amiri Kipita in the year 1985.

On further cross examination, DW 4 said none of the trio brothers was alive but before their deaths, entrusted him with custody of their valuable documents in the year 1995 (exhibits D 2, D 3 and D 4).

On further cross examination, JUMA HASHIM GONGA said Exhibit D 5 were pictures of the Kipita family graveyard that were personally taken by him and located within the disputed land.

On re - examination by Mr. Dominicus Nkwera, the witness said the pictures (Exhibit D 5) were produced in Court to prove the Kipita family owned the graveyard and the land in dispute.

On further re - examination, DW 4 said:

"I am certain that those pictures show graves of the Kipita family because I am the one who took those pictures. The graves shown are at our family cemetery."

On further re – examination, the witness said up to the year 1994 or 1995, CCM leaders doubled as village leaders under one party rule.

DW 5 TABIA JUMA NASSORO, served in different leadership capacities at Mapinga Village between 1997 and 2015.

From 1997 to 2006, he was a Village Executive Officer for Mapinga Village. From 2010 to 2015 he served as a Councillor for Kerege Ward.

He recalled that around the year 2011, the plaintiffs attempted to use excessive force by employing police officers to evict occupants of the land in dispute.

As a Councillor, he intercepted the plaintiffs' move and directed them to comply with the law.

Regarding ownership of the disputed land, the witness said:

"6. That I strongly amuse how the plaintiffs claimed to own the same disputed land this is because I did not have any information if the plaintiffs own legally the land in dispute. This is because at Mapinga Local Government at that time when I was a leader every information of the lawful owners of the land was kept there in the office and not otherwise."

On further examination regarding ownership of the disputed land, DW 5 stated that:

"7. Therefore I strongly deduce that the land in dispute from 1985 owned legally by Kipita's family as mentioned above perhaps they sold to other people. Nothing more.

8. However in that land in dispute there is an office of Tungutungu Local Government from 1994 and also there are cemetery in that land. For cemetery (ies) were there in the land in dispute more than 30 years. It is amazing for the plaintiffs to claim they own that land in dispute. And in sometime I participated in the interment in that cemetery area in the land in dispute."

On cross examination by Mr. Daibu Kambo, DW 5 recalled what transpired in the meetings convened to resolve the dispute in the year 2012, thus:

"I remember a meeting of 10/05/2012 which involved the Kiharaka Village, residents of Tungutungu hamlet, Ward Councilor, the Officer Commanding Mapinga Police Station and the Ngolle family.

Agenda of the meeting was to discuss a dispute between the Ngolle and Kipita families over ownership of the disputed land.

We discussed the dispute at length and directed that since the matter touched on land ownership between the two families, then the dispute be referred to competent forums for determination.....

I do not recall of a resolution that recognized the Ngolle family as lawful owners of the land and that trespassers were required to leave in three (3) months.

It is not true that in that meeting, me as a counsellor I urged trespassers to respect a resolution that required them to vacate from the land in 3 months."

DW 6 OMAR JAFAR KIPITA, the second defendant herein and a resident of Mapinga Tungutungu, traced ownership of the land in dispute by the Kipita family as testified by DW 3 and DW 4.

The witness said he was one of the children of the late Jafari Mbwana Kipita @ Jafari Mbwana Kupita who was allocated twelve (12) acres of land by Mapinga Village Council on 10th July 1985.

He said in accordance to Ngindo customs, Jafari Mbwana Kipita gave a portion of his 12 acres measuring 20 by 40 paces to him in the year 2004.

He identified his land as bordering Juma Hashim Gongga (South), Haji Said Kipita (North), Juma Hashim Gongga (West) and a road (East).

The witness said he has been in continuous undisturbed occupation of the disputed land for almost 16 years from the year 2004.

He said the dispute arose in 2012 when the plaintiffs claimed to own the disputed land hence this suit.

Like other defendants' witnesses, DW 6 challenged the plaintiffs' sale agreements and averred that the disputed

land accommodated more than 300 people including children of the late Said Amiri Kipita.

On cross examination by Mr. Daibu Kambo, DW 6 said the disputed parcel of land was orally given to him by his late father.

On re – examination by Mr. Nkwera, the witness said in Ngindo customs, once a child attains puberty, he/she is given a piece of land to start independent life.

DW 7 BAKARI SELEMANI MALAYA, 83 years old man, resident of Mapinga Kiharaka, said he settled at Mapinga, Bagamoyo District, Coast Region since the year 1982.

He strongly believes the Kipita family legally own the disputed land on account of the allocation by the Mapinga Village Council in 1985.

The witness who held leadership positions in the Chama Cha Mapinduzi between 1985 and 1999, said during his tenure in leadership, several people were allocated land by the Mapinga Village Council.

He named the beneficiaries to include: the Kipita family, Mr. Gabriel, Mr. Kiteleko and Mr. Luyaya.

On further examination, DW 7 said he had no knowledge on the plaintiffs' ownership of the disputed land and added that:

“6.....at Mapinga Local Government at that time when I was a leader ... every information of the lawful owners of the land was kept there in the office and not otherwise.”

Regarding status of the disputed land, the witness stated that from 1982 to 2011, more than 300 people had occupied the disputed land and wondered why the plaintiffs zeroed down on the six (6) defendants.

On cross examination by Mr. Daibu Kambo, DW 7 stated that Chama Cha Mapinduzi was responsible in land allocation during the one party rule.

Explaining further, the witness said:

“Those days CCM Chairman and Secretary allocated land. As a Branch CCM Chairman, I was under the Village CCM Chairman.”

Recalling leadership structure at the time, DW 7 said:

“In 1985 the Chairman of Mapinga Village was Juma Nassoro. The Secretary of the Village was one Mr. Mtawa.”

In 1985 the Secretary of CCM Mapinga Branch was Rashid Mtawa.”

DW 8 HASSAN MPANDUKA KODIBADO, resident of Mapinga Tungutungu, told this Court that he settled at Tungutungu Mapinga, Bagamoyo from 1992 to date.

The witness said in February 1992, he bought a parcel of land measuring thirteen (13) acres from Jafar Mbwana Kipita and his relatives at a consideration of Tshs. 260,000/=.

On examination, DW 8 said at the time of purchase, the land had cashewnut and baobab trees. He slowly developed it by building a house and planting other

• permanent and temporary crops like banana, mango and cassava.

Overtime, he sold portions of his land to various people and at the time of testimony, he remained with a parcel measuring 20 by 40 paces.

He named those who bought land from him to include Adriano Minja and Abdu Yusti Ngumbi (third and fifth defendants respectively).

On further examination, DW 8 said his present parcel of land was bordered by Hashim Said Kipita (South), Gabriel Robert (North), Jafar Mbwana Kipita (East) and Hamis Luyaya (West).

The witness strongly refuted plaintiffs' claims that the defendants invaded the disputed land in 2013 citing his own example that he was in occupation thereof since 1993.

The witness challenged names of purported sellers in Exhibits P 17 to P 22 inclusive explaining that: *"..those names appearing as sellers never lived or owned a piece of land in that land in dispute by any means..."*

Relating history of the dispute to the present suit, DW 8 said that:

"11. That in 2012 after I discovered that my piece of land mentioned and claimed to own the same thing not true, by the Ester Gervas Ngolle, the 2nd plaintiff in this suit that is why in 2013 I sued more than one person including the 2nd plaintiff in this suit before the Kerege Ward Land Tribunal in Application No. 29 of

2013 whereby the trial tribunal after visiting the land in dispute and seen many houses more than 300 ordered to sue all of them in order for the justice to be met. It is amazing why the plaintiffs sued only six defendants and leave us whereby we are still living in that land in dispute and not otherwise."

On cross examination by Mr. Daibu Kambo, DW 8 admitted to have sold parcels of land to Adriano Minja and Abdu Yusti Ngumbe before a ten cell leader.

On further cross examination by Mr. Kambo, DW 8 said:

"Members of the Kipita family are in this Court and recognize me as a person I (who) bought land from their family.

I bought my land in 1992 March. The plaintiffs have a duty to show me as to when they bought that land."

On re – examination by Mr. Dominicus Nkwera, DW 8 defended his ownership of the disputed land, thus:

"Juma Hashim Gongga and Omar Kipita were present when I bought the land in dispute. I bought that land from their parents."

These testimonies by DW 1, DW 2, DW 3, DW 4, DW 5, DW 6, DW 7 and DW 8 traced history on ownership of the disputed land by the defendants.

I also examined the five exhibits tendered by the defendants, namely: Exhibits D 1, D 2, D 3, D 4 and D 5.

Exhibits D 2, D 3 and D 4 are land allocation certificates issued by Mapinga Village Council on 10 July 1985 to Hashim Said Kipita, Saidi Amiri Kipita and Jafari Mbwana Kupita respectively.

The certificates were signed by Iddi Mtawa (Village Secretary) and Juma Nassoro (Village Chairman) which facts tallied with the evidence given by DW 7 Bakari Selemani Malaya.

DW 7 Bakari Selemani Malaya, DW4 Juma Hashim Gongga and DW 5 Tabia Juma Nassoro testified on fusion of the Village Council and CCM leadership roles during the one party rule in 1985.

Their testimonies are reflected in Exhibits D 2, D 3 and D 4 which were stamped with a stamp of "*Katibu Tawi la CCM Mapinga*" despite of being issued by the Mapinga Village Council.

I have also examined Exhibit D 5, photographs of various cemeteries located in the Kipita family graveyard that was referred to by DW 1, DW 2, DW 3, DW 4, DW 5, DW 6, DW 7 and DW 8.

Exhibit D 1 is a sale agreement between Hassan Mpanduka Kodibado and Adrian Minja dated 20 April 1997 in respect of a parcel of land measuring twenty (20) by forty (40) paces.

This document cemented testimonies of DW 8 Hassan Mpanduka Kodibado, DW 2 Adrian Minja and even DW1 Abdu Yasin Ngumbe.

Generally speaking, the evidence given by the eight witnesses for the defendants corroborated each other and pointed a finger to one line of history, that the disputed land was originally allocated by the Mapinga Village Council to three members of the Kipita family who are now deceased and subsequently passed over to their children (first, second and six defendants) as gifts and to other persons by way of sale.

None of the eight witnesses for the defendants some of whom settled at the disputed land as early as 1982, seemed to know or recognize any of the alleged sellers or witnesses contained in Exhibits P 17, P 18, P 19, P 20, P 21 and P 22.

With this evidence on record, I am satisfied that by a balance of probability, the defendants established that they are not trespassers but lawful owners of the disputed parcels of land.

The last issue is what reliefs are parties entitled to?

Mr. Daibu Kambo prayed for the Honourable Court to grant the reliefs listed in the Plaint whereas Mr. Dominicus Nkwera urged this Court to enter judgment for the defendants.

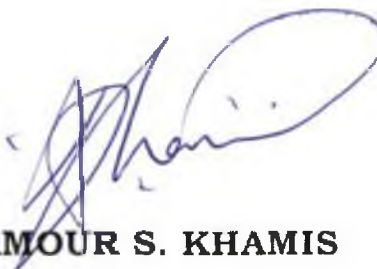
In view of the determination given above, the survey process carried out by the plaintiffs on the disputed parcel of land was not justifiable and the resultant certificates of title admitted as Exhibits P 1 to P 13 inclusive as well as Exhibit P 23, were not validly issued for they originated

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from Exhibits P 17, P 18, P 19, P 20, P 21 and P 22 which did not meet the legal threshold on land ownership.

It follows therefore that the defendants are hereby lawful owners of the disputed parcels of land and the suit is dismissed.

Considering nature and history of the dispute, I make no order for costs.

It is so ordered.



AMOUR S. KHAMIS

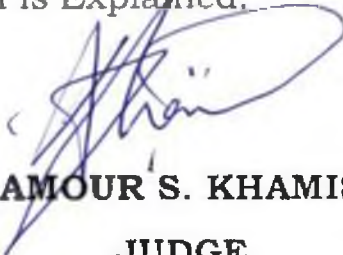
JUDGE

12/08/2022

ORDER

Judgment delivered by way of Video Conference in presence of Mr. Daibu Kambo, advocate for the plaintiffs and Ms. Khadija Zuberi, advocate, holding brief of Mr. Dominicus Nkwera, advocate for the defendants.

Right of Appeal is Explained.



AMOUR S. KHAMIS

JUDGE

12/08/2022

