

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.125 OF 2021

SHABANI MRISHO KISEBENGO 1ST PLAINTIFF
SELEMANI MOHAMED KAMNOLE 2ND PLAINTIFF
ABDALLAH SELEMANI KWENE 3RD PLAINTIFF
NASRA ADAMU DAUDI 4TH PLAINTIFF

VERSUS

NICODEMUS YOHANA NYAMAJEJE 1ST DEFENDANT
NAFTALI LUHWANO KISINGA 2ND DEFENDANT
MATHA P. KAA YA (Administratrix of the
Estate of the late PANIEL ZAKARIA KAA YA) 3RD DEFENDANT
BENAGDIT MWINGWA 4TH DEFENDANT

JUDGMENT

Date of the last Order: 25.08.2022

Date of Judgment: 27.09.2022

A.Z. MGEYEKWA, J

The Plaintiffs, SHABANI MRISHO KISEBENGO, SELEMANI MOHAMED KAMNOLE, ABDALLAH SELEMANI KWENE, and NASRA ADAMU DAUDI, represented 206 others by way of representing order of

25th September, 2019 by Hon. Maghimbi, J. They lodged this suit against Defendants, alleging that the 1st Defendant in 2014 to 2015 trespassed and unlawfully sold the suit Farm measuring 100 acres to the 2nd, 3rd, and 4th Defendants. The Plaintiffs prays for judgment and decree against the Defendants jointly and severally as follows:-

- a) A declaration that the Defendants are trespassers.
- b) Declaration the 1st Defendant had no any colour of ownership over the farm hence his disposition was unlawful.
- c) A declaration that the disputed 100 acres lawfully belongs to the respective 210 people.
- d) This Honourable Court be pleased to order the eviction and demolition order against the Defendant.
- e) This Honourable Court be pleased to issue permanent injunctive order against the Defendants and their relatives fto enter into the Plaintiffs' farms and claim ownership and from demolishing the houses of the Defendant.
- f) This Honourable Court be pleased to order the Defendants to pay general damages Tshs. 105,000,000/= to the house of the people whose names have been mentioned in paragraph No. 7 above.
- g) Cost of the suit be provided for

- h) Any other relief(s) as this Honourable Court may deem fair and just to grant.

In response to the Plaint, on 21st September, 2021, the Defendants filed a joint Written Statement of Defence. Defendants disputed all the claims and urged this court to dismiss the entire suit with costs. The Defendants also filed a Counter Claim. The Plaintiffs in the Counter Claim pray for judgment and decree against the Defendants in the Counter Claim jointly and severally as follows:-

- a) An order compelling the Defendants to vacate the suit premises and allow the Plaintiffs to occupy and enjoy the premises.
- b) A declaration that the Defendants are trespassers to the property.
- c) An order for permanent injunction against the Defendants, their agents, and workmen restraining them from trespassing in the suit premises.
- d) An order for demolition of any structure built on the said suit property.
- e) General damages for the disturbance occasioned to the Plaintiffs of an amount to be determined by the Court.
- f) Costs of this suit.
- g) Any other such reliefs as the Honourable Court may consider just and appropriate to grant

With leave of the Court, the Defendants in the Counter Claim filed an amended Written Statement of Defence on Counter Claim and the Plaintiffs in the Counter Claim filed a Reply thereto.

The facts giving rise to this suit are not difficult to comprehend. The facts, as can be deciphered from the pleadings and evidence on record go thus: The Plaintiffs are alleging that the 1st Defendant sometime in 2014 to 2015 trespassed and unlawfully sold the Farm of all 210 people without any colour of ownership. Sometime in 2012, the 2nd 3rd, and 4th Defendants unlawfully and without observing the concept of buyer be aware negligently bought the Farms measuring approximately 100 acres and the Plaintiffs occupied different acres out of 100 acres.

The Plaintiffs are alleging that they occupied the suit farm naturally since they were born in the said land and the majority of them are occupying $\frac{1}{4}$ acre. They alleged that they developed the suit land by constructing houses two decades ago. It is alleged that the 4th Defendants on 25th June, 2021, 26th June, 2021, and 7th July, 2021 trespassed the farms and unlawfully demolished six houses with a total value of Tshs. 105,000,000/=. The 2nd and 3rd Defendants bought the farms from the 1st Defendant who had no any ownership over the farms. Hence they decided to lodge the instant suit.

The Plaintiffs in the Counter Claim are alleging that the Defendants have entered the suit premises without permission and interfered with the Plaintiffs' peaceful enjoyment of the suit land. They claim that the 1st Defendant is the lawful owner of the suit land located at Sagale Kambini Viziwaziwa Ward, Kibaha at Coast Region. He legally applied the ownership of the suit land in 2001, surveyed the suit land, and was issued with 6 Titled Deeds; registered as Farm No. 2234, farm No. 2235, farm No. 2236, and farm No. 2237 bearing the names of the 1st Plaintiff and Plot No. Nos. 5 and 6 are registered in the name of Nicodemus Nyamajeje & Hodrum Benedict Suleiman T/A Poles International School. Sometimes in 2013, the 1st Plaintiff sold part of the suit plot; farm No. 2234 No. 2235, and Farm No. 2236 to the 2nd, 3rd, 4th, and 5th Plaintiffs and they sold the Farms to other people.

At all the material time, the Plaintiffs were represented by Mr. Kumwenda, advocate while Defendants were represented by Mr. Erick Kamala, learned counsel.

During the Final Pre-trial Conference, the following issues were framed by this Court: -

- 1) *Who is the lawful owner of the suit land.*
- 2) *To what reliefs are the parties entitled to.*

The Plaintiff's case was founded on six witnesses; Nasri Adam Daudi testified as PW1, Shabani Mrisho Kisepengi (PW2) Abdallah Sulemani Kiwene testified as PW3, Selemani Mohamed Kamnole (PW4), Benego Joel Muzika (PW5) and Ismail Mohamed Kiwene was the sixth witness.

The Defendants summoned eight witnesses; Benedict Mwingwa who testified as DW1, Clement Kisinga (DW2), Martha Francis testified as DW3, Hassan Omary Hassan testified as DW4, Naftali Luliwano (DW5), Erastus John Makuwi testified as DW6, Nicodemus Yohanna Nyamjeje testified as DW7 and Upendo Kiwelu was the eighth witness. The Plaintiff tendered a total of two Exhibits namely; a Representative suit Ruling 25th September, 2019 (Exh.P1) and Risala ya CCM (Exh.P2).

On their side, the Defendants tendered five Exhibits namely; a Sale Agreement between Nicodemu Naftali Namajeje and Naftali L. Kisinga 10th March, 2014 (Exh.D1), a District Commissioner Meeting Minute Sheet dated 5th October, 2018 (Exh.D2), copies of three Certificates of Occupancy and three Sketch Maps (Exh.D3), a Land Rent Assessment document issued in 2001 (Exh.P4) and a letter Titled *Maombi ya kufuta Hati Shamba la Ndugu Nicodemus Yohana Nyamajeje* dated 25th January, 2016 (Exh.P5).

The evidence of the Plaintiffs was almost similar. All Plaintiffs who testified before the Court testified to the effect that the suit is measuring 100 acres,

they are lawful owners of the suit land, it is customary land, their parents gave them and they have constructed houses therein. PW1 and PW3 testified that they are representing other 210 villagers who were unable to appear before this court to testify. To support their testimonies they referred this court to exhibit P1.

PW1 and PW2 testified to the effect that their pieces of land is measuring their 1/3 each, acres while PW3, PW4, and PW5 claimed that each of them has a piece of land measuring ½ acre. PW1, PW2 PW3, and PW4, testified that Nicodemus Nyamajeje is a trespasser, he bought a huge area in Sagale and intended to plant pineapples, however, the 1st Defendant did not develop the suit land and he sold the suit land to other people. PW1, PW2, and PW3 testified that Nicodemus in his Written Statement of Defence stated that in 2001 he applied for a piece of land which is located at Viziwaziwa Ward, however, at that time it was the Ward of Kibaha and the Ward of Viziwaziwa was established in 2015. PW3 testified that the 1st Defendant sold the suit land while the villagers were residing in the suit land.

PW3 testified that they became aware that the suit land was invaded and people installed pillars and were digging sand. PW1 and PW3 testified that DW2, DW3, and DW34 have destroyed and uprooted their crops and demolished six villagers' houses. When PW1 was cross-examined, he

testified to the effect that exhibit P2 is related to CCM manifesto she does not have any document which shows when Viziwaziwa Ward was established. PW5 and PW6 testified to the effect that the Nicodemus bought the suit land from the village Government.

On the defence side, the Defendants denied all the claims. DW1, DW2, DW3, and DW4 testified to the effect that they bought the suit land from Nicodemus Nyamajeje (DW5) and DW7 claimed that he is the lawful owner of the suit land.

Before determining the issues so framed, I will first address the law on the burden of proof in civil cases. The burden lies with the person who instituted the suit. Section 110 (1) of the Law of Evidence Act, Cap. 6, provides that:-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Section 110 (2) of the Law of Evidence Act, Cap. 6, provide that:-

"When a person is bound to prove the existence of any fact it is said that the burden lies on that person".

Another salient principle of the law, which are applicable in civil litigation and which will guide this Court in the course of determining this suit is "Parties are bound by their pleadings." Pleadings in this sense include the

Plaint, Written Statement of Defence, affidavits, and reply therein if any. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the plaint or produced before the first date of hearing of the suit. The Court is required to examine the entire pleadings and the totality of evidence tendered, together with an assessment of the credibility of the witnesses who appeared before the Court. The evidence adduced before the Court must be weighed and not counted.

From the above position of the law, the Plaintiffs are the ones who filed this suit before this Court. They are the ones who are required to prove that they are the lawful owner of the disputed land and they had to lead evidence to show that the Defendants are trespassers.

In resolving the controversy before me, the above underlying principles, and case laws shall guide my evaluation and analysis of the evidence that was presented by parties in this suit, pleadings together with the final submissions by the learned counsels, and the framed issues by the court will be resolved seriatim:

By the consent of the parties, on 27th September, both learned counsels filed their Final Written Submissions Both learned Advocates complied with the court order and their final submissions were considered in

articulating this Judgment. I am grateful to the learned counsel for the energy and industrious research involved in canvassing the issues herein.

As already alluded to hereinabove, before me, there are two issues for determination. The first one is *who is the lawful owner of the suit land*. The analyses of this issue show that the parties herein lock horns on who is the lawful owner of the suit property. In a chronological account of the ownership of the property the Plaintiffs presented; that they occupied the suit land two decades ago. The Plaintiffs testified to the effect that they occupied the suit land naturally since some of them were born in Sagale and their parents gave them the suit land. They also claimed that in 2002 as per paragraph 6, they constructed houses before the arrival of the Defendants.

First of all, each Plaintiffs was required to prove his/her ownership because their claims are related to individual ownership not co-ownership, therefore, each of them was required to defend himself/herself and prove their ownership.

Secondly, the six Plaintiffs who appeared in Court to testify failed to prove how they acquired the suit plots. I am saying so because natural occupation is not part of proving ownership of land. Their testimonies were mere words without any supporting evidence. They even failed to call their parents to support their claims. It is worth noting that the proof of landed

property ownership in a surveyed/planned area is proved by a Certificate of Title or the Letter of Offer is well articulated under section 2 of the Land Registration Act, Cap. 334. Section 2 of the Land Registration Act, Cap. 334 [R.E 2019] read:-

"The person for the time being in whose name that estate or interest is registered".

According to above-cited provision, a *prima facie* proof of ownership of registered land is its registration and in this matter the Certificate of Title. Nicodemus Nyamajeje tendered a Certificate of Title while the Plaintiffs had no any Certificate of Title alone cannot prove that the suit house is duly registered and is owned by the plaintiff. The Certificate of Title in the name of the Plaintiffs would have been substantial proof of their ownership. It is worth noting that a Risala of CCM (Exh.P2) is not a cogent document to prove ownership of land. Again the Plaintiffs claims that they constructed houses in 2002, are mere words and doubtful because they have no any proof to prove their allegations.

In my considered view, the Plaintiffs' evidence; was inconsistency and contradictory; PW3 and PW5 testified to the effect that the Village Allocation Committee allocated the suit land to Nicodemus Nyamajeje while at the same time they testified that Nicodemus Nyamajeje bought the suit land. PW5 testified to the effect that the Village allocated the suit

land to the Nicodemus Nyamajeje for investment. PW4 and PW5 claims arose after finding that Nicodemus Nyamajeje sold part of the suit land to other Defendants. The Plaintiffs evidence was such contradictions which went to the root of the matter because they are complaining that DW5 bought the suit land then they want this Court to declare DW5 and other Defendants trespassers to the suit land. Therefore, I find that the Plaintiffs' contradictions go to the root of the matter, and the same has weakened the case. See the case of **Chrisant John v. Republic**, Criminal Appeal No. 313 of 2015.

Another shortfall, uncertainty of the size of alleged plots. In the Plaintiff in paragraph 5 claimed that each of them is occupying an average of 1/4 acre whilst in their testimonies; PW1 and PW2 testified to the effect that they are owning 1/3 acres. PW3 testified that his plot is measuring 1 acre. PW4 and PW5 alleged that their plots are measuring 1/2 acre. In my view it is not correct to claim what was not stated in their pleadings. 1 acre or 1/2 cannot be estimated as 1/4 acre.

PW5 testified that he was the former Street Chairman of Sagale and claimed that Nicodemus Nyamajeje trespassed the suit land. But in his testimony, he admitted that Nicodemus Nyamajeje was allocated 100 acres land. He stated that DW7 applied for a piece of land and the Village Government in its meeting approved his request. PW3 and PW6 testified

in favour of DW7. The Plaintiffs claimed that the 2nd and 3rd Defendants invaded their land and demolished their houses. The Plaintiffs' evidence were mere words, there is no any cogent evidence to prove the same. It is worth noting that a party can only succeed on what he has averred and produced evidence. See the case of **Makori Wassana v Joshua** [1957] TLR 88. Therefore, the tantamount that the Defendants are trespassers is unfounded.

On the side, Nicodemus Nyamajeje (DW7) in chronological order testified how he obtained the suit land. He claimed that he is the lawful owner of occupied the suit land. He bought from different people from 1999 to 2006. He testified that in Sagale Kambini he has 85 acres; 56 acres are surveyed, 5 acres with a title deed, 7 acres with an offer, and 8 acres are unsurveyed. To substantiate his claims he tendered copies of a copy Certificate of Titles issued by the Registrar of Title and a copy of Sketch Map, (Exh.D3).

DW7 testified to the effect that the Plaintiffs invaded his land and reported the matter to the Police Officers who directed DW7 to report the matter to the District Commissioner for Kibaha. To prove his ownership DW7 tendered Land Rent Assessments receipts issued by the Ministry for Land addressed to Nicodemus Yohana Nyamajeje. (Exh.D4) collectively. The documents prove that Nicodemus Yohana Nyamajeje paid Land rents with

respect to a plots located at Viziwaziwa, Kibaha Town Council within Coast Region.

DW7 also tendered a Sale Agreement (Exh.D5), however, until the closure of the hearing of the case the same was not stamped. Apart from the sale agreement, the evidence on record is in favour of Nicodemus Yohana Nyamajeje. DW1, DW2, and DW5 testified to the effect that they bought the suit land from DW7. DW3, who was the formal Street leader, and DW4, a villager residing at Sagale Village, testified to the effect that Nicodemus bought the suit land and bought from different people a total of 56 acres. Hassan Omary (DW4) aged 70 years, is residing at Sagale, he testified to the effect that the Plaintiffs are not residents or were not born in the suit area. DW4 and Martha Francis (DW3) testified to the effect that Nicodemus bought the suit land from different individuals.

Naftali (DW5) testified to the effect that, he bought the suit land from DW7. To support his testimony he tendered a Sale Agreement (Exh.D1) and a Minutes Sheet titled '**Muhtasari wa Mkutano wa Mkuu wa Wilaya ya Kibaha**, the District Commissioner successful settled a dispute between DW7 and the Villagers of Sagale Kambini and ruled out that Nicodemus Nyamajeje' Title Deeds are genuine. DW6, the acting Executive Officer of Sagale Kambini Street testified to the effect that Nicodemus bought the suit land and the village committee or meeting approved his request, one

Benego was the Chairman of Sagale Kambini and he was the Executive Officer. His evidence was supported by (Exh.D2) a Minutes Sheet.

According to the evidence, I find that it is awkward for the Plaintiffs to claim ownership over the suit land whilst they admitted that Nicodemus Yohana Nyamajeje bought the suit land but they were not happy after seeing him selling part of the suit land to other Defendants. I also take into account the testimony of former village leader; Martha Francis (DW3) and DW6 who testified in favour of Nicodemus Nyamajeje and they testified to the effect that the Plaintiffs are invaders.

Additionally, the evidence shows that the Plaintiff wrote a letter titled '*Maombi ya kufutiwa Hati*' to the Minister for Land praying the Minister to revoke Nicodemus ownership of 100 acres for failure to develop. In my considered view, it remains unclear that whilst the Plaintiff claim rightful ownership of the suit land, the same have requested for revocation of DW7 ownership implying that their ownership is doubtful.

It is settled law that the parties are bound by their pleadings, the pleaded facts or is at variance with the pleaded facts must be ignored. See **Lawrence Surumbu Tara v AG and 2 Others**, Civil Appeal No. 56 of 2012 and **Alliance Insurance Corporation Ltd v Arusha Art Limited**, Civil Appeal No. 297 of 2017. The court can grant reliefs thought in the pleading and proved by evidence. In the instant case, the Plaintiffs

evidence and as per the letter (Exh.D7) shows clear that they the Village Government allocated the suit land to DW7. Consequently, the Plaintiffs cannot come before this Court and want to be declared lawful owners of 100 acres while in reality, they know back to front that the suit land was allocated to Nicodemus Yohana Nyamajeje (DW7). The evidence speaks loudly and clearly that the Plaintiffs wanted to grab the suit Farm un-procedural.

To be precise as far as the evidence of the Plaintiffs and Defendants as a whole, the conclusion I draw is that the Plaintiffs have failed to discharge their burden to the required standards to prove that they are lawful owners of the suit land and therefore it is not proved that the Defendants were trespassers. On this premise, the Plaintiffs are not the lawful owners of the suit land.

The evidence on records are in favour of the Plaintiffs in the Counter Claim. In the upshot, Nicodemus Yohana Nyamajeje (DW7) is the lawful owner of the suit premises. Therefore the first issue is answered in favour of the Plaintiffs in the Counter Claim.

On the second issue; *what reliefs are parties entitled to*. From the above analysis and findings, it is clear that the Plaintiffs are not entitled to any reliefs claimed because they failed to establish and prove their ownership of the suit land. Therefore the plaintiffs' suit is dismissed with costs.

In the Counter Claim, the Plaintiffs are claiming for general damages. It is noteworthy that general damages are issued after the court assesses the evidence on record. The same was stated in the case of **Anthony Ngoo and Davis Anthony Ngoo v Kitinda Maro**, Civil Appeal No. 25 of 2014 (unreported). An aggrieved party must produce evidence to show that he has suffered loss and such loss suffered and prove that such loss was directly caused by an unlawful act, omission or negligence of the other party. In the case at hand, there is no any cogent evidence to establish that the Plaintiff is entitled to general damages. Therefore, the same cannot be granted.

In the light of the evidence adduced before me, this Court is issuing the following reliefs:-

1. Nicodemus Yohana Nyamajeje is declared a lawful owner of the suit Farm located in Sagale Kambini, Viziwaziwa Ward, Kibaha District within the Coast Region.
2. The Defendants in the Counter Claim are declared trespassers.
3. The Defendants in the Counter Claim are ordered to vacate the suit land.
4. The Defendants in the Counter Claim, their agents, and workers are permanently restrained from trespassing the suit land.

5. The Defendants in the Counter Claim are ordered to demolish any structure built in the suit land.
6. The Defendants in the Counter Claim are to bear the costs of the suit.

Order accordingly.

Dated at Dar es Salaam this date 27th September, 2022.

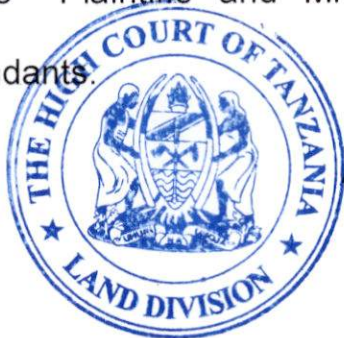



A.Z.MGEYEKWA

JUDGE

27.09.2022

Judgment delivered on 27th September, 2022 in the presence of the 1st and 3rd Plaintiffs and Mr. Erick Kamala, learned counsel for the Defendants.




A.Z.MGEYEKWA

JUDGE

27.09.2022

Right to appeal fully explained.