

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 17 OF 2020

DORCAS NYAKATO NDYETABULA 1ST PLAINTIFF

PATRICIA F. MSUMALI 2nd PLAINTIFF

VERSUS

SAID HAMIS ZAKARIA DEFENDANT

JUDGMENT

Date of the last Order: 31.03.2022

Date of Judgment 13.04.2022

A.Z.MGEYEKWA, J

The Plaintiffs, Dorcas Nyakato Ndyetabula and Patricia F. Msumali brought this action against the Defendant. The facts giving rise to this suit are very simple and not difficult to comprehend. The facts, as can be deciphered from the pleadings and evidence on record go thus: the Plaintiffs claims to be the lawful owner of the suit land measuring 250

acres located in Lukonde area in Malela Village in Mkuranga District Coast Region. The land which they lawfully purchased from different villagers, in diverse dates in 2008 and the said Sale Agreement was witnessed by Yavayava Village Council. The Plaintiffs claim that they offered approximately 6 acres to the Village Council for community development projects. The Plaintiffs were in possession of the suit land without claims from anyone.

According to the Plaintiffs, in 2016, the Village boundaries were varied and Lukonde area was administratively moved from Yavayava Village Council and placed under neighbouring village known as Malela Village Council. In 2010, the Plaintiff hired the Defendant to oversee the property and taking care of the properties, crops, and trees and he was paid for the task. The Plaintiff claimed that in 2017, surprisingly the Defendant maliciously started to dispose the suit property by way of sale to various people and the Plaintiff noted the unlawful disposition around July, 2019 when they paid a visit to the suit land and the same was subdivided and different marks were placed.

They claimed that in course of selling the land, the Defendant, directly and indirectly, committed acts of cutting cashew nut, coconut, mango trees, and other plants, the total damage was to a tune of Tshs.

50,000,000/=. The Defendant was served with a demand letter and was approached to settle the matter amicably but the efforts were fruitless since the Defendant interfered and demarcated another parcel of land within the suit land.

In their Complaint, the Plaintiffs pray for Judgment and Decree against the Defendant as follows:-

- i. Be pleased to declare that the Plaintiffs are the lawful owners of the disputed parcel of land/properties.*
- ii. Be pleased to declare that the Defendants and their families' relatives are trespassers in the disputed parcel of land/properties;*
- iii. Be pleased to restrain the Defendants, their agents, or anybody acting on their behalf from any kind of interference in the Plaintiffs' land;*
- iv. Orders the Defendants, jointly and severally, to pay the specific damages to the tune of TZS. 50,000,000/= for the destroyed crops and trees in the suit property;*
- v. Orders the Defendants, jointly and severally, to pay general damages to the tune of TZS. 200,000,000/=.*
- vi. Orders the demolition of the Defendants houses unlawfully built in the suit property;*

- vii. *Grants eviction order against all the trespassers to the disputed land;*
- viii. *Orders that the Defendants pay the costs of and incidental to the suit;*
and
- ix. *Any other reliefs that this Honourable Court may deem fit to grant.*

The suit was argued *ex parte* against Said Hamis Zakaria, the Defendant. I am alive to the fact that the Defendant was aware of the hearing of this case since he attend the mediation sessions whereas, the Plaintiffs successful settled the matter with the 6th Defendants and the Said Hamis Zakaria denied to settle the matter and he did not attend the hearing of this case. Having regard to the entire circumstances of this case, I am of the considered view that the Defendant did not want to prosecute his case, therefore, I grant the Plaintiff's prayer to proceed *ex parte* against him.

It is imperative at the outset to point out that, this matter has also gone through the hands of my learned sisters; Hon. Mango, J who conducted the 1st Pre-Trial Conference, hearing of the Plaintiffs and Hon. Madeha, J conducted Mediation. I thank my predecessors for keeping the records well and on track. I thus gathered and recorded what transpired at the

disputed land and now have to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

At all the material time, the Plaintiff was represented by Mr. Kelvin Tadei Luambano, learned Advocate.

The Plaintiff's case was founded on by Patricia E. Msumali, who testified as **PW1**, Ramadhani Shija Masesa who testified as **PW2** and Fredrick Bernard Msumali (**PW3**). The Plaintiff's side tendered a total of five (5) documentary Exhibits to wit; a Deed Poll dated 8th October, 2020 which was admitted by this Court and marked as **Exhibit P1**. Certification documents issued by the land Surveyor were admitted by this Court and marked as **Exhibit P2** collectively. Three (3) Sale Agreements were admitted by this Court and marked as **Exhibit P3** collectively. A letter issued by Mkurungenzi wa Wilaya of Mkuranga was admitted by this Court and marked as **Exhibit P4** and GN. No. 537 dated 19th July, 2019 was tendered and admitted by this court as **Exhibit P5**.

Patricia E. Msumali, the second plaintiff in her testimony started to introduce herself as Patricia Fredrick Msumali, Patricia F. Msumali, and Patricia Paul Mdimi. She testified that her same are used interchangeable. To substantiate her testimony she tendered a Dee Poll (Exh. P1). The Plaintiff testified to the effect that she is a businesswoman residing at

Kimara – Temboni. She testified that she is the lawful owner of the suit land measuring 250 acres located at Lukonde area within Malela Village previously it was known as Yavayava Village.

The second Plaintiff went on to testify that she has lodged the instant suit against the Defendant has trespassed into her land. She testified that the 1st Plaintiff is her friend, they have bought a piece of land together and later they divided the land. The second Plaintiff testified that this case started with 7 Defendants and during mediation, they settled the dispute with all Defendants save for SAID HAMIS ZAKARIA who demanded that he has 8 acres within the Plaintiff's land. The second Plaintiff stated that she bought the suit land from three different farmers on diverse dates. She named the vendors; Kiwambe, Mgagi and Magata. To substantiate her testimony she tendered a Sale Agreements which was admitted and marked as exhibit P3 collectively.

The second Plaintiff went on to testify that Yavayava Village allocated their piece of land and they were issued with a letter. To substantiate her testimony she tendered 5 letters which were admitted and marked as exhibit P2 collectively. The second Plaintiff stated that they hired the Defendant as their caretaker and they build a hut within the suit land where he was residing. She went on to testify that after a while they came to

realize that in 2019, the Defendant sold part of the Plaintiffs land. The second Plaintiff stated that from the year 2008, they used to visit the suit land often until the year 2017 when there was a crisis at Kibiti, they were afraid to visit the farm instead they were in contact with the Defendant who used to bring them watermelons from their farm. The second Plaintiff urged this court to declare her the lawful owner of the suit landed property restrain the Defendant and his agents from any kind of interference in her land and order the Defendant to bear the costs of the suit.

Ramadhani Shija Masesa, testified as PW2. He testified to the effect that he resides in Lugode area within Yavayava Village. He said that he is a farmer and is living in that village since 2003 and at that time he was a leader of Yavayava Village. He said that he know the Plaintiffs who are the lawful owner of the suit land. To substantiate his testimony he tendered a letter written by the Village Council, the same was admitted and marked as exhibit P4. PW2 testified that the Plaintiff bought plots and they hired the Defendant as a caretaker in 2010. He said that before the Plaintiff had one caretaker known as Bulugeti from Kigoma Region.

PW2 continued to testify that the Plaintiff assigned PW2 and Defendant to plant Mitiki tress in the suit land. PW2 testified to the effect that the Plaintiff bought the suit land form the natives; Mohamed Mgagi, Shabani Kiwangwe, and Abel Mwangata. He said that later the Defendant sold the

Plaintiff's land thus the dispute arose. The second witness of the Plaintiffs went on to testify that the Plaintiff gave them a portion of land measuring 6 acres to build the Yavayava Village office in order to enable them to conduct social activities. PW2 further testified that the Yavayava Village was divided by the GN of 2019. To substantiate his testimony he tendered a copy of GN. No.537 which was admitted and marked as exhibit P5.

There was another piece of evidence from the testimony of Fredrick Bernard Msumali. He testified to the effect that the second Plaintiff is his wife and the 1st Plaintiff is his friend's wife. PW3 testimony reflected what PW1 testified. In short, PW3 testified that the Defendant was entrusted by the Plaintiff to supervise the suit land. PW3 stated that they did not visit the suit land for a long time because of Kibit crises in 2017 thus later they came to realize that the Defendant disposed of part of the Plaintiffs land.

At the Final Pre-Trial Conference, the Plaintiffs and the Defendants proposed the following issues which were adopted by the court as follows:-

1. *Whether the Plaintiffs are lawful owners of the disputed land*
2. *Whether the disputed land is situated at Yavayava Village*
3. *To what relief are the parties entitled to*

The first issue for determination as agreed by the parties but proved *ex parte*, is *whether the Plaintiffs are lawful owners of the disputed land*. The evidence advanced by the Plaintiff *ex parte* is quite overwhelming that the Plaintiff acquired the disputed parcel of land which is in dispute but his caretaker claimed to be the lawful owner of the suit land. The testimony of Patricia F. Msumali; PW1 is quite vivid that the Plaintiff is a lawful owner of the disputed plot in that the defendant is the trespasser. And as if to clinch the matter, PW2 testified that the Defendant has never owned 8 acres within her plots.

In the premises, the allocation to the second Plaintiff still stands valid. In the light of the documents issued by the land Surveyor (**Exh. P2**), the 3 Sale Agreements (**Exh. P3**) prove that the second Plaintiff is the lawful owner of the suit land. The Plaintiffs bought the suit land at Yavayava Village. Her testimony is supported by PW2, the former leader of Yevayava Village who testified to effect that the Plaintiffs are well known as lawful owners of the suit land which was allocated to them by Yavayava Village. The second witness tendered a letter issued by *Mkurungenzi wa Wilaya of Mkuranga* (**Exh. P4**) and GN. No. 537 dated 19th July, 2019 (**Exh. P5**) proves that the second Plaintiff acquired the suit land lawful. At the end, I am satisfied that the second Plaintiff is the lawful occupier of the disputed plot.

It is a cardinal principle of evidence that he who alleges must prove. This principle is enshrined in our law of evidence under section 110 (1) of the Law of Evidence Act, Cap. 6 [R.E 2019]. This provision reads:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must.”

The onus is upon the Plaintiff to prove that the parcel of the suit land belongs to her. The first issue is therefore answered in the affirmative.

As to the second issue *is whether the disputed land is situated at Yavayava Village*. PW1, PW2 and PW3 testified to the effect that the suit land is allocated in Lukonde area within Malela Village previously it was known as Yavayava Village. PW2 went further to prove that the Yevayava Village in 2019 was divided and Malela Village was established through GN.537 dated 19th July, 2019. The document was admitted in court as Exhibit P5. Therefore, I am satisfied that the second issue is therefore answered in the affirmative.

The third issue as framed is in respect of the *reliefs to which the parties are entitled*. The Plaintiff craved for several reliefs in the plaint. The evidence adduced seeks a declaration that the Plaintiffs are the lawful owner of the disputed plot, to declare that the Defendant and his families

are trespassers in the suit parcel of land, to restrain the Defendant, his agents, or anybody acting on their behalf from any kind of interference in the Plaintiff's land.

In the Plaintiff's prayer, the Plaintiffs prayed for this court to order the Defendant to demolish his houses built in the suit property. Inasmuch as in the second Plaintiff is declared the lawful owner of the suit land that means that the Defendant is required to demolish any unlawfully landed property in the suit land.

There is another prayer in the plaintiff to the effect that the Plaintiffs are claiming specific damages. It is worth noting that specific damage must be *specifically pleaded and proved*. This being specific damage, the second Plaintiff failed to prove the said damages. In the case of **Zuberi Augustino v Anicet Mugabe** [1992], TLR 137 the Court of Appeal of Tanzania held that:-

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved".

Similarly, in the case **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] TLR 165 Court of Appeal of Tanzania holds that:-

“On the claims for special damages, it is a trite principle of law that where special damages are claimed, they must be proved in evidence.”

Guided by the above authorities, I find that there was no proof of the Plaintiff's claim as stipulated under paragraph (iv) of the reliefs prayed by the Plaintiffs.

The last prayer is about the costs of the suit. The award of costs is at the discretion of the court as provided for under Section 30 of the Civil Procedure Code Cap.33 [R.E 2019]. It is a fact that the Plaintiff would not have bothered to come to court if the Defendant had messed up, as a result, the Defendant acts necessitated the plaintiff to incur costs in hiring an advocate, filing fees, transport et cetera and therefore.

On my part, I think the second Plaintiff is entitled to the costs of the suit. I shall demonstrate. In the adversarial system of adjudication, without mince words; I have to follow the principle stated under section 30 (2) of the Civil Procedure Code Cap.33 [R.E 2019] that costs shall follow the event. In the case at hand, the second Plaintiff has prosecuted this case to its finality and, certainly, has incurred costs in this endeavour. These are costs involved in the suit the Defendant must shoulder and I find no sufficient reason why the Plaintiff should be deprived of the same.

In the case of **Bowen, L.J. in Cropper v Smith** (1884), 26 Ch. D. 700, at p. 711, quoted by the High Court of Uganda in **Waljee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd** [1971] 1 EA 188 in which His Lordship stated:

"I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have very seldom if ever, been unfortunate enough to come across an instance where a party ... cannot be cured by the application of that healing medicine".

In a similar tone, Hon. Othman, J. (as he then was), the foregoing excerpt in **Kennedy Kamwela v Sophia Mwangulangu & another**, Misc. Civil Application No. 31 of 2004 (unreported) when confronted with an identical situation with the following simple but powerful and conclusive remarked:-

"Costs are one panacea that no doubt heals such sore in litigations".

I share the sentiments of their Lordships in the foregoing quotes respecting costs as a panacea in litigation. I recap that costs are one panacea that soothes the souls of litigants that, in the absence of sound reasons, as is the case in the present case, this court is not prepared to deprive the Plaintiff of. These are foreseeable and usual consequences of

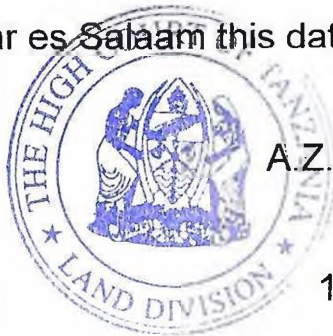
litigation that Defendant must shoulder. Based on the foregoing, I find and hold that the second Plaintiff is entitled to the costs of this suit.

In the upshot, the case is decided for the second Plaintiff, and I proceed to declare and decree as follows:-

- 1) The 2nd Plaintiff is declared a lawful owner of suit land within the Lukonde area in Malella Village in Mkuranga District, Coast Region.
- 2) The Defendant is consequently declared a trespasser of this plot.
- 3) The Defendant and agents or anybody acting on their behalf are restrained from any kind of interference in the 2nd Plaintiff's land.
- 4) The Defendant is required to demolish any unlawful landed property in the suit land.
- 5) The Defendant shall pay the 2nd Plaintiff's costs of this suit.

Order accordingly.

Dated at Dar es Salaam this date 13th April, 2022.



A.Z.MGEYEKWA

JUDGE

13.04.2022

Judgment delivered on 13th April, 2022 in the presence of Mr. Kelvin Luambano, learned counsel for the Plaintiffs.



A.Z.MGEYEKWA

JUDGE

13.04.2022

Right to appeal fully explained.