

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 82 OF 2018

MOHAMED ENTERPRISES (TANZANIA) LTD PLAINTIFF

VERSUS

BAVO EMMANUEL MZEE 1ST DEFENDANT

FLORA LOSINDOLO MZEE 2ND DEFENDANT

JUDGMENT

Date of the last Order 30.12.2021

Date of Judgment 18.01.2022

A.Z.MGEYEKWA, J.

At the centre of controversy between the Plaintiff **MOHAMED ENTERPRISES (TANZANIA) LTD** and the Defendants **BAVO EMMANUEL MZEE** and **FLORA, LOSINDOLO MZEE** is a piece of land located at Alavi Sisal Estate, Soga Area, Kibaha District, within Pwani

Region, registered by Title No. 4896. Plaintiff contends that the Defendants trespassed into the suit landed property.

In the Plaint, the Plaintiff prays for Judgment and Decree against the defendants for a declaration that the Defendants are trespassers in the suit premises and they should permanently be restrained from trespassing into the suit land. The Plaintiff also prays for an eviction order against the Defendants and costs of the suit.

In response to the Plaint, on 6th September, 2018 the Defendants filed a joined Written Statement of Defence disputing all the claims and urged this court to dismiss the entire suit with costs and declare the Defendants as lawful owners of the suit premises and any other reliefs as this Court may deem fit to grant.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brother Hon. Maige, J (as he then was) who heard the Plaintiff's and Defendant's case. I thank my predecessor for keeping the records well and on track. I thus gathered and recorded what transpired at the disputed land and now I have to evaluate the evidence adduced by the witnesses to determine and decide on the matter in controversy.

At all the material time, the Plaintiff was represented by Mr. Elisa Msuya and Ms. Catherine Solomon, Ms. Neema and Ndasamburo learned Advocates while the Defendants were represented by Mr. Said Aziz, and Mr. Frank learned Advocates. During the Final Pre-trial Conference, the following issues were framed by this Court:-

- 1) *Whether the Defendants are trespassers on the landed property with Title Deed No. 4896.*
- 2) *Whether the village council has the power to allocate plots No. 5098 and 5099 to the Defendants.*
- 3) *Whether the Plaintiff is the rightful owner of the suit property.*
- 4) *To what reliefs are the parties entitled.*

In what seemed to be a highly contested trial, the Plaintiff called two witnesses and the Defendants summoned three witnesses. The Plaintiff's case was founded on Mr. Edgar Mwasha, who testified as **PW1**, and Mr. Ndekirwa Lewalo Nnyari (**PW2**). The Defendants' called three witnesses; Ms. Flora Losindilo Mzee who testified as **DW1**, Mr. Mohamed Ally Said who testified as **DW2** and Mr. Selemani Hamisi Lugegwa who was the third witness (**DW3**).

Due to the circumstance of this case, this Court called four witnesses, Ms. Hellen Philip from the office of the Commissioner for Lands who

testified as **CW1**, Ms. Nina Nimwesiga from the Directorate of Survey and Mapping (**CW2**), Mr. Waziri Masoud Mgaga from the Office of the Registrar of Titles who testified as **CW3** and Mr. Hans Msemu, a private surveyor who testified as **CW3**. The Plaintiff's side tendered a total of five (5) documentary exhibits. To support their defense case the Defendants tendered ten (10) documentary exhibits and the Court witnesses' tendered nine (9) exhibits.

Mr. Edgar Mwashu (PW1) introduced himself as a Principal Officer working with Stanbic Bank Tanzania Limited. He adopted his affidavit and testified to the effect that he is responsible to provide services to the corporate client businesses. He went on to testify that Plaintiff is among their client and currently is possessing the Plaintiff's original Certificate of Title No.4896 within Alavi Sisal Estate, Soga Area, Kibaha District, within Pwani Region, which was deposited as security for a loan advanced to the Plaintiff. Therefore, the title deed belongs to the Plaintiff.

Ndekirwa Lewalo Mnyari (PW2), after being sworn adopted his affidavit and stated that he is the principal officer of the plaintiff. He testified to the effect that the Plaintiff is the lawful owner of the disputed land with Title No. 4896 situated at Soga, Kibaha District, within Pwani Region belong to the plaintiff from 1999 and that the defendants trespassed the disputed

land in 2012, where he made a lot of measures and communication notifying the defendants to stop trespassing the plaintiff's land but in vain. He tendered exhibits P2, P3, P4, and P5.

During cross-examination, PW2 testified that the Plaintiff's land was legally registered in the year 1939 before the establishment of villages in 1972 and that the suit was purchased by the plaintiff from a receiver and Manager on behalf of a bank. Again, it is clear as per Exhibit P1 and the attached deed plan on entry No. 103406 the property was transferred to the Plaintiff on 30.06.1999.

On the other hand, the Defendants, Ms. Flora Losindilo Mzee (DW1) testified that the suit premises belongs to the Defendants. The Defendants and their witnesses DW2 and DW3 testified that the defendants obtained the suit land which was the village land between 2008 -2009, in which 25 acres were purchased from DW2 Mohamed Ally Said involving the Kipangege village Leaders, and another 76 acres were purchased directly from Kipangege village through the required procedures in acquiring the village land including involving the Village Assembly and village Council minutes are available. Whereas later the defendants registered the land and were issued with Letters of Offer to both defendants on 30th March, 2010 recognizing Farm No. 5098 and 5099. To substantiate his testimony he tendered Exhibits D1, D2, D3, D4, D5, D6, D7, D8, D9, and D10.

In cross-examination DW1 stated that he did not conduct any official search to know whether the suit land was registered in the name of the 3rd party, rather he was assured by the neighbors. He added that their Letters of the Offer were issued on 30th March, 2010.

Mohamed Ally Saidi was the second defence witness. He testified to the effect that he sold 25 acres of the suit land to the Defendants and a Sale Agreement was prepared on 26th February, 2009. In his affidavit, he stated that the Sale Agreement bares all the particulars of the farm and the same was witnessed by the Kipangege Village Chairman within Kibaha District, in Pwani Region.

During cross-examination DW2 stated that he is aware that the Plaintiff has a plot at Soga at Kibaha District within Pwani Region. He stated further that his land is an unsurveyed farm situated within the village land.

During cross-examination, DW3 testified that he is the Village Executive Officer. He said that the village initiated the registration of the suit land during *Operation Vijiji* and the plot is registered with Certificate of Registration No. PW/KIJ/542 dated 10th February, 1973 and at that time Soga and Kipengege were one Village. DW3 testified that he is aware that the law permits a village to own land. It was his testimony that the Village was issued with a certificate of title. He testified to the effect that before

allocating the suit land to the Defendants, they satisfied themselves that the suit land was not allocated to other people. He said that the village land has been demarcated.

When DW3 was recalled tendered the affidavit of Mr. Bravo Mohamed Mzee who is the first Defendant. In his affidavit, Bravo Mzee deponed to the effect that they bought 25 acres of the suit land from Mohamed Ally Saidi and a Sale Agreement was prepared on 26th February, 2009. In his affidavit, he stated that the Sale Agreement bares all the particulars of the farm.

Ms. Hellena Philip (CW1) testified to the effect that the records reveal that the Registrar of Titles issued the Certificate of Title No. 4896 concerning ownership of the suit land to the Plaintiff. CW1 testified that their office does not recognize the Defendant's Letters of Offer which were issued on 30th March, 2010 for the reason that the Ministry of Land had stopped issuing the Letters of Offer since 2009, that the defendants could not obtain the letters of offer in 2010. The court witness clarified that the said Letters of Offer were not accompanied by the deed plan hence that it is difficult to locate the exact location of Farms No. 5098 and 5099.

When cross-examined, CW1 testified that the owner of the suit land is Mohamed Enterprises (T) Limited and that the boundaries of the land are shown in the CT.

Ms. Nina Nimesigwa (CW2) a witness from the Ministry of Land, Directorate of Survey and Mapping, testified to the effect that she managed to revive the boundaries concerning CT No. 4896. She testified that in the process to resurvey she was accompanied by Mr. Hans who is a private or Plaintiff's surveyor. She testified that during the exercise they managed to relocate three beacons which include the Defendants Farm. She testified that the CT 4896 was issued in 1939 and since then the beacons were not placed in the said land. To substantiate her testimony she tendered a copy of the map which contain 500 acres (Exh.C4) and she also tendered a Map of two villagers which was admitted and marked as exhibit CW5. CW2 also tendered Village Maps including CT 4896, CT 4896/1, Farms No. 5098, and 5099 which were collectively admitted as exhibit C5 and zoomed map was admitted as exhibit C6.

Ms. Nina also tendered a satellite image which includes CT 4896 and two Farms No. 5098 and 5099 (Exh.C7). Ms. Nina went on to testify that Farms No. 5098 and No. 5099 are located within CT 4896 including the centre of Kipangege village.

When cross-examined, Ms. Nina testified to the effect that the Defendant's land was surveyed within the Plaintiff's farm at Kipangege Village. She said that CT 4896 has never been revoked. She said that Farms 5098 and 5099 are illegal since the same are created within CT 4896. Ms. Nina testified to the effect that the map was issued in 1939 after country planning but the circumstance is not the same since the Kipangege village is within CT 4896. She testified that Farms No. 5098 and 5099 were surveyed by Kibaha District and they prepared the survey plan thereof. It was her testimony that the said Farms are legal since the map was certified by the Director of Mapping of Kibaha District. CW2 went on to testify that according to exhibit C7, the image shows that the important services such as hospital and school are circled green and the village offices and Government forest are within CT 4896.

Waziri Masuri Mganga, from the office of the Registrar of Titles, was the third court witness who testified that according to the original Certificate of Title, Mohamed Enterprise Ltd are the lawful owner of the suit land which contain 4246 acres. To substantiate his testimony he tendered a Certificate of Title with Registration No. 4896/1 issued on 11th August, 1959 (Exh.C).

When he was cross-examined, he testified that formerly the suit land was within Kisarawe, Temeke Municipality, while now it is considered to be in Soga Pwani Region.

CW4 was the last court witness, who testified to the effect that he and CW2 were tasked to re-survey the piece of land with CT 4896. According to the witness, the starting point was beacon 31, No.32, and No. 33 another beacon was far from the disputed plot. CW4 testified that C7 shows that Farms No. 5098 and No. 5099 are within CT 4896.

During cross-examination, CW4 testified to the effect that they used coordinates to measure the suit land and the beacon were missing. He testified that Farms No. 5098 and 5099 were created within CT 4896. It was his view that it was not correct to create the said farms within CT even if the same was approved by the authority. He testified that the approved survey plot No. 5098 and 5099 were registered in 2010 and he has not seen any amended plan which removed the farms. It was his view that if the Director of Survey and mapping has surveyed and made a Plan thereof, no one can do the same exercise.

After a careful consideration of the rival submissions from both parties via their respective learned counsel, I would like to consolidate the 1st and 3rd issue and determine them altogether.

There is no dispute that the suit land with Certificate of Title No. 4896 situated at Soga area, Kibaha District, within Pwani Region, with approximately 4246 acres, was ordinarily owned by *Mohamedali Alibhai Karimjee, Yusufali Alibhai Karimjee, and Tayabari Hassanali Alibhai Karimjee* trading under the name of *KARIMJEE JIVANJEE AND COMPANY* from 11.08.1939 as per CW-1. The same appears to have been transferred to the Plaintiff since 27.10.2014 as per *exhibit P1*.

DW3, the Village Executive Officer of Kipangege Village testified to the effect that the suit land is located at Kipangege Village with registration No. PW/KIJ/542 10.02.1973 and not Soga Village. However, the land surveyors; Ms. Nina (CW2) and Mr. Hans (CW4) visited the suit land and found that that the suit land extend to Soga village as well. They were tasked to resurvey the suit land to know the exact boundaries of the land claimed to belong to the Plaintiff and find out whether the Defendants have encroached in the Plaintiff's suit land. CW2 and CW4 used the control points in the resurveying exercise. CW2 testified to the effect that they established beacons No. CW31, CW32, and CW3 in which the lands claimed by the Defendants, that is Farms No. 5098 and No. 5099 are within the Plaintiff's suit land.

I have noted that the evidence of CW2 and CW4 are to the extent that Certificate of Title No. 4896 is approximately 500 acres and apart from the Defendants Farms No. 5098 and No. 5099, the Kipangege village, District Council offices and human settlements are within the suit land. In my considered view, the Plaintiff is claiming ownership over land which comprises other parties who have interests or residing therein but they are not a party to the matter at hand. Following the testimonies of CW2 and CW4, the Kipangege villagers and the village itself seem to be in the disputed land. In the instant case, the Plaintiff chose to sue only two defendants. The village council and other villagers who are inhabiting the piece of land claimed to be owned by the Plaintiff are not parties to the suit.

I understand that the claimant is the one who chose whom to sue. However, in the instant circumstance the issue of joining necessary parties is unavoidable because of the nature of the case and relief claimed. It is trite law that the court of law must certify itself that the Plaintiff's claims are against proper parties. Taking into consideration that DW2 and DW3 testified to the effect that the Kipengege village obtained a Certificate of Occupancy regarding the area which is within Certificate of Title No. 4896, they are interested and necessary parties to the

proceedings. The term of necessary part is defined in the Black's Law Dictionary, 8th Edition to mean:-

"a party who, being closely connected to a lawsuit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings."

In the case of **Tang Gas Distributors Ltd v Mohamed Salim Said & 2 Others**, Civil Application for Revision No. 68 of 2011 (unreported). The court considering circumstances upon which a necessary party ought to be added in a suit stated that: -

*"...an intervener, otherwise commonly referred to as a **NECESSARY PARTY**, would be added in a suit under this rule ...even though there is no distinct cause of action against him/ where: -*

(a) NA

*(b) **his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit.*** [Emphasis added].

Similarly, in the case of **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman and Another**, Civil Revision No.6 of 2017 (unreported) and **Juliana Francis Mkwabi v Lawrent Chimwaga**, Civil Appeal No. 531 of

2020. In the case of **Abdullatif Mohamed Hamis** (supra), the Court of Appeal of Tanzania faced with an akin situation stated that:-

" The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."

Being guided by the above authorities and having reflected on the matter at hand, I am on settled view that, In case we chose to proceed to determine the issue of ownership, the issue to ask is whether or not, in the absence of the party (ies), an executable decree can be passed.

In addition, to proceed determining this case, the necessary parties proprietary rights will be directly affected, thus, to avoid multiplicity of suits, their joinder is necessary so as to have them bound by the decision of the court in the suit. Therefore, their presence before the court are necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, contrary to that, the court can make a decision that may affect other parties unheard.

Consequently, in the instant circumstance, the matter before this Court is improper. Thus, the first and third issues cannot be determined in exclusion of other parties.

In the upshot, the suit deserves to be struck out for want of necessary parties. I therefore, strike the entire suit without costs.

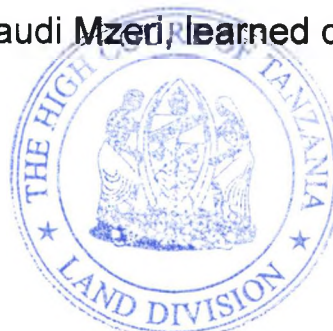
It is so ordered.

DATED at Dar es Salaam this 20th January, 2022.




A.Z.MGEYEKWA
JUDGE
20.01.2022

Judgment delivered on 20th January, 2022 in the presence of Ms. Irene Mehan and Ms. Ndesamburo, learned counsels for the Plaintiff and Mr. Daudi Mzeri, learned counsel for the Defendants.




A.Z.MGEYEKWA
JUDGE
18.01.2022

Right to appeal full explained.