

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE No. 24 OF 2022

MARIA SAIMON MUSHILO.....1ST PLAINTIFF

MOHAMED KINDAMBA NGWERENJE.....2ND PLAINTIFF

VERSUS

YUSUF MZEE NGORORO..... DEFENDANT

JUDGMENT

27th June & 10th August 2023

L. HEMED, J.

MARIA SAIMON MUSHILO and **MOHAMED KINDAMBA NGWERENJE**, are the plaintiffs in the instantaneous suit. They claim ownership of the unsurveyed piece of land measuring 36 acres located at Ubafu Village at Bagamoyo District in Coast Region. The plaintiffs have described the suit land to be bordering **ABDALLAH SAID LUKURO** in the east part, while in north, south and west parts is bordered by one **SIMBA SELEMAN**.

The plaintiffs' alleged that around 12th day of May, 2002, the defendant **YUSUF MZEE NGORORO** intentionally and unlawfully

encroached to the suit land and denied the plaintiffs an opportunity to peacefully enjoy ownership of their piece of the suit land. They thus pray for judgment and decree against the defendant as follows:-

- a. A declaration that the plaintiffs are the lawful owners of the unsurveyed piece of land located at Vikawe, Kibaha District Coast Region herein referred to as the suit premises.
- b. That a declaration that the defendant is the trespasser over the suit premises.
- c. An order requiring the defendant to hand over the suit premises to the plaintiffs.
- d. General damages for inconveniences caused.
- e. Costs for the suit.
- f. Any other relief(s) that the Honourable Court may deem fit and proper to issue.”

The defendant disputed the claims of the plaintiffs vide the written statement of defence. He stated that the suit premises mentioned therein, Ubafu village Bagamoyo, are completely unknown to him and that none of the pieces of land he owns in Vikawe borders any land owned by Abdallah Said Lukuro or Simba Seleman. He pleaded to own a surveyed piece of

land at Vikawe Village, Farm No.1823 with Certificate of Title No.51177. He prayed for dismissal of the suit with costs.

At the final pre-trial conference held on 1st day of August, 2022 before my sister at the bench, **Hon. Dr. Mwenegoha, J**, the following were the deliberated issues for determination of the matter at hand:-

1. Who is the lawful owner of the disputed property
2. What reliefs are parties entitled to.

To prove their case, the plaintiffs' evidence was as follows: the 2nd Plaintiff who testified as PW1 told the Court that he acquired his piece of land measuring 20 acres in 1990. He adduced that the said land is situated at Vikawe-Ubafu and was allocated to him by the Village Council under the chairmanship of one Amani Faki. He tendered the application letter for allocation of land (exhibit "P1"). He paid TZS 8100/= to the village council, contributed ten (10) iron sheet and seven (7) bags of cement for construction of the office.

He added that his farm is bordered by one Simba Selemani and currently it has been invaded since 2021. When he was cross-examined he told the court that Ubafu village is in Bagamoyo District, Coast Region.

PW2 one **FAKI AMANI NGULOMBE** testified that he was the chairman of the village of Vikawe in 1990. He confirmed that the plaintiffs applied and were allocated pieces of land. The 1st Plaintiff was allocated 20 acres and the 2nd Plaintiff was allocated 16 acres at Ubafu – Kitongoji. He tendered the minutes of the Village Council to prove that the plaintiffs were allocated the respective pieces of land (exhibits "P2"& "P3"). Another witness who was paraded by the plaintiff was PW3, one **MRISHO RAMADHAN SALUM**, who only testified to be the chairman of the village council from 1991 up to 2000.

The 1st Plaintiff testified as **PW4**. She testified to have acquired a piece of land of 16 acres situated at Vikawe-Ubafu in 1991. She applied to the Village Council for allocation of 20 acres and the village council allocated to her only 16 acres. She tendered the application letter to that effect(exhibit "P 4"). He adduced that the defendant has encroached her '*shamba*' and planted beacons around her piece of land. When cross-examined, she told the court that her piece of land is at Ubafu-village.

On his part, the defendant testified as **DW1**. He testified that he owns a piece of land at Vikawe- Kibaha District in Coast region measuring

13.800 hectares. He told the court that he acquired the land in 1993 and 1994 through the village council of Vikawe and by purchasing it to neighbours. The defendant adduced that he applied for allocation of land to the village of Vikawe verbally through the Village Executive Officer of Vikawe Village. He paid TZS 8100/= and TZS 10,000/ as contribution for construction of the village office. He tendered the letter for approval to join the village and the receipts thereof (exhibit "D1").

DW1 told the court that apart from the land that was allocated by the Village Council, he purchased some other pieces of land from 7 neighbours. He stated that from one Pascal Kibagu, he purchased two (2) acres; from **Said Kapwile** he bought 1 and $\frac{3}{4}$ acres; from Ramadhan Jota he purchased 3 acres; Jaffar Abdallah Ngabika, sold to him 1 and $\frac{1}{4}$ acre; from Simon Michael, he purchased 2 acres; from Ramadhan Luziga, he bought 1 acre; and one Mohamed Mtimbe, sold to him 10 acres. He tendered the sale agreements which were collectively admitted as exhibit P6.

He further testified that in 1998, he applied for survey of the piece of land through the Village Council. His application was approved (exhibit

"D2"). He paid the necessary fees for survey to the Kibaha Council (exhibit "D3"). After the survey he was issued with the Certificate of Title No.5177. DW1 adduced that the said certificate has been surrendered for purposes of resurveying plots (exhibit " D 4"). He also tendered the Survey Plan No. 103954(exhibit "D 5").

The defendant also called DW2 one JOEL JUMANNE CHANGWE who testified to know the defendant as his neighbours. I was also manager in his farm. He told the court that the defendant was allocated 6 acres and later on it he purchased some pieces of land from neighbours and became

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Another witness of the defendant was one TWAHA HALIFA NKULLO the land surveyor from the Survey and Mapping Department- Kibaha (DW3). He testified to confirm that the defendant's land has been surveyed through survey plan No.E1/393/188 of Vikawe – Mpiji, Kibaha Town Council with registration Plan Number 103954 (exhibit 'D5'). According to DW3, the Plan is for Block K Vikawe Mpiji and is of Plots Nos.450 up 523.

Having gone through the testimonies, it is now apt to determine the issues as were framed at the final pre-trial conference. The

1st issue is on who is the lawful owner of the disputed property. The plaintiffs claim ownership of the unsurveyed piece of land measuring 36 acres located at **Ubafu Village** in **Bagamoyo** District - Coast Region. In the Plaint the plaintiffs described their pieces of land to be bordering **ABDALLAH SAID LUKURO** in the east part, while in north, south and west parts is bordered by one **SIMBA SELEMAN**. Since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings. This has been held by courts in several decisions, for instance in **Barclays Bank(T)Ltd vs. Jacob Muro**, Civil Appeal No.357 of 2019 the Court of Appeal of Tanzania observed that:-

"We feel compelled, at this point, to restate the time-honored principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at the variance with the pleaded facts must be ignored."

This position was also echoed in **Yara Tanzania Limited vs. IKUWO General Enterprises Limited**, Civil Appeal No.309 of 2019 that, parties are not allowed to depart from their pleadings. In this case therefore, the plaintiffs are bound to prove their claims as pleaded in their

joint Plaint that they own unsurveyed pieces of land measuring 36 acres located at **Ubafu Village in Bagamoyo** District - Coast Region bordering pieces of land owned by **ABDALLAH SAID LUKURO** in the east part and **SIMBA SELEMAN** in north, south and west parts. According to section 110(1) and (2) of the Evidence Act,[Cap.6 RE 2019], it is the duty of the plaintiffs to prove the existence of this fact and not the defendant who denied the same. This was held in **Habiba Ahmadi Nangulukuta & 2others vs Hassan Ausi Mchopa (the Administrator of the Estate of the late Hassan Nalino) & Another**, Civil Appeal No.10 of 2022, thus:-

"The burden of proving a fact rest on the party who substantially asserts the affirmative of the issues and not upon the party who denies it.."

Evidence adduced by PW1, PW2 and PW3 could not establish the exactly location of the claimed 36 acres. I am holding so because exhibits P1 and P4 are mere application letters for allocation of land while exhibits P2 and P3 are minutes of the Village Council for Vikawe approving their applications. However, all four exhibits do not establish that the land purported to have been allocated to the plaintiffs is at Ubafu-Village as

pleaded in the Plaint. The exhibits tendered by the plaintiffs during trial show the allocating authority to be the village Council for Vikawe Village and not Ubafu-Village Council. Additionally, the said exhibits do not prove the location of the suit landed property.

In their Plaint, the Plaintiffs have described their properties to be bordering pieces of land owned by **ABDALLAH SAID LUKURO** in the east part and **SIMBA SELEMAN** in the north, south and west parts. However, the said neighbours mentioned in the pleadings were not called to testify. It is my firm opinion that, the two persons who were mentioned in the Plaint, were key witnesses in proving the plaintiffs' claims. Being mentioned as neighbours, they were necessary in proving title, location and boundaries of the piece of land owned by the plaintiffs. Failure to call them is as good as having failed to prove the claims. In **Hemed Saidi v Mohamedi Mbilu**, [1984] T.L.R 113

"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the party's interests."

In the instant case, the plaintiff did not parade ABDALLAH SAID LUKURO and SIMBA SELEMAN, the key witnesses to testify. The court is thus entitled to draw inference that if they had appeared to testify, they would have adduced evidence contrary to the plaintiffs' interests.

I am aware that according to **Habiba Ahmadi Nangulukuta & 2others vs Hassan Ausi Mchopa (the Administrator of the Estate of the late Hassan Nalino) & Another**,(supra), it is not the duty of the defendant who denied the claims to prove, however, going through testimonies given by DW1 and DW2 and exhibits D5 the land alleged to be owned by the defendant is a surveyed land under survey plan No. E1/393/188 with registration No.103954 and registered under Certificate of Title No.51177. The land owned by the defendant according to exhibits D5 is located at Vikawe,Mpiji –Kibaha Town Council and not at Ubafu Village as alleged by the plaintiffs in their pleadings. This means that the plaintiffs have failed to prove the allegation that the defendant has invaded their pieces of land. To answer the 1st issue, the plaintiffs have failed to prove that they own the suit pieces of land.

The 2nd issue was on what reliefs are the parties entitled to. It should be noted that this case had only one key issue that is, on ownership of the suit premises. The plaintiffs have failed to prove their allegations that they are owners of the claimed landed properties and that the defendant had encroached into the alleged pieces of land. Having failed to prove ownership of the suit land, the plaintiffs deserves none of the claimed reliefs.

In his written Statement of Defence, particularly in paragraph 14, the Defendant prayed for the following relief(s):-

"14. The Defendant herein avers that this suit has been brought without merit and is frivolous and vexatious and the Defendant prays that it be dismissed with costs".

In the circumstance of this case, I find that the relief(s) sought by the defendant deserve(s) to be granted. In the upshot, I proceed to dismiss the entire suit with costs. It is so ordered.

DATED at DAR ES SALAAM this 10th August, 2023.




L. HEMED
JUDGE