

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 221 OF 2021

BETWEEN

CHARLES KIARUZI1ST PLAINTIFF
ATHUMANI MNUBI 2ND PLAINTIFF
ALLY S MAYUBI 3RD PLAINTIFF
MOHAMED MBONDE..... 4TH PLAINTIFF
MUSSA MKWAYA 5TH PLAINTIFF
HAWA IBRAHIM 6TH PLAINTIFF
FATUMA RAMADHANI 7TH PLAINTIFF
HEMED SAID 8TH PLAINTIFF

VERSUS

JOSEPH NESTORY ISACK 1ST DEFENDANT
IMMACULATE SWARE SEMESI2ND DEFENDANT
MARRY MASUA.....3RD DEFENDANT

JUDGMENT

Date of last Order: 14/07/2022

Date of Judgment: 17/08/2023

A. MSAFIRI, J.

The eight (8) plaintiffs in this suit namely Charles Kiaruzi (1st plaintiff), Athumani Mnubi (2nd plaintiff), Ally S. Mayubi (3rd plaintiff), Mohamed Mbonde (4th plaintiff), Mussa Mkwaya (5th plaintiff), Hawa Ibrahim (6th plaintiff), Fatuma Ramadhani (7th plaintiff) and Hemed Said (8th plaintiff), have instituted a suit against the three defendants namely Joseph Nestory

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Isack (1st defendant), Immaculate Sware Semesi (2nd defendant) and Marry Masua (3rd defendant).

The plaintiffs jointly and severally claim against the defendants for declaration order that the plaintiffs are the rightful and lawful owners of pieces of land situated at Pangani within Kibaha District measured 300 acres (herein suit land or suit premises). The plaintiffs further claims that the defendants are the trespassers to the suit premises.

The plaintiffs averred in their Complaint that on unknown day of 2021, the defendants forcefully and illegally invaded the plaintiffs by breaking and occupying the plaintiffs' premises of which the plaintiffs have been using as farms and for other activities. That the defendants have decided to establish their activities in the suit premises and have barred the plaintiffs from entering or doing anything on their suit land and put security guards who stopped the plaintiffs from enjoying the use of their premises.

The plaintiffs hence pray for judgment and decree against the defendants as follows:

1. Declaration that the plaintiffs are the rightful and lawful owners of all pieces of land in dispute located at Vikawe in Kibaha measured 300 acres demarcated as per paragraph 3 of this Complaint.

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2. Declaration that the defendants are trespassers and they have no any right over the plaintiffs' land.
3. That demolition of any structure or development put by the defendants or any of their assignee or agent and eviction order against the defendants from the plaintiffs' premises or land.
4. Order to surrender the plaintiffs' properties or its replacement costs to the plaintiffs.
5. The defendants to be ordered to pay the plaintiffs general damages, punitive and explanatory damages as will reasonably be assessed by this Honourable Court.
6. The defendants be ordered to pay the plaintiffs interests.
7. Costs be borne to the defendants.
8. This Honorable Court be pleased to order any other relief(s) deemed so fit and just to grant.

The 1st defendant filed his written statement of defence (WSD) and later prayed for the amendment of the same which was granted by this Court. He denied vehemently all the claims by the Plaintiffs and also filed a counterclaim.

In the counterclaim, the 1st defendant claimed for declaratory orders that Farm No. 1599/1 and Farm No. 1579/2 both located at Pangani in Kibaha Town Council (referred as suit property) belongs to him. That he bought the suit property between the years 1995 and 1997 without any encumbrances. That, from May 2020, the 1st defendant (plaintiff in counterclaim) discovered that the plaintiffs (defendants to the

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counterclaim) have unlawfully entered into the suit property. The 1st defendant (plaintiff) prays jointly and severally that;

- a. Declaration that, the plaintiff is the lawful owner of the suit property and the defendants have illegally occupied the same.
- b. Permanent injunction from entering and making any act and or changes of whatsoever nature in the suit property.
- c. Payment of the sum of TZS 350,000,000/= as specific damages for the destruction caused to the suit property.
- d. Payment of general damages to be assessed by the Court.
- e. Payment of interest at commercial rate of 21% of paragraph c, d and e above, from the date of filing of this suit till judgment until payment in full.
- f. Costs of this suit.
- g. Any other relief(s) as this Honourable Court may deem fit and just to grant.

The 2nd defendant also filed her amended WSD in which she denied each and every claim by the plaintiffs. She prayed for the dismissal of the suit with costs.

The 3rd defendant also filed her WSD in which she denied each and every claim by the plaintiffs. She prayed for the dismissal of the suit with costs.



The plaintiffs were represented by Mr. Joseph Mandela Mapunda, learned advocate, the 1st and 2nd defendants had legal services of Mr. Armando Swenya, learned advocate while the 3rd defendant were represented by Mr. Richard Kimaro assisted by Ms. Ivone Masai, learned advocates.

Before the trial took off, the parties framed two issues which were adopted by the Court to be issues for determination of the matter. The framed issues are;

1. Who is the lawful owner of the suit land?
2. To what reliefs are parties entitled.

As I have observed earlier, the 1st defendant also filed a counterclaim and this Court ruled that the said counterclaim shall be tried simultaneously with the main case.

In a bid to prove their case each party called witnesses. The plaintiffs testified orally with their witnesses while the defendants and their witnesses opted to testify by witnesses' statements which were previously filed in Court as per the requirement of the law.

The plaintiffs besides testifying themselves orally as witnesses, they call other witnesses making a total of ten (10) plaintiffs' witnesses. *Alls.*

PW1 was Charles Kyaruzi Baliagati who is the 1st plaintiff. He said that he claim his farm against the three defendants. That, the farm is at Pangani, Kibaha District in Pwani Region, and is measured at a size of 35 acres. He named the farm to border the road on the East, Ali Mayubi on the West, the road on the South and Athumani Mnubi on North.

He testified that he got his farm in 1993. That there was an advertisement made by the office of Pangani Ujamaa Village which was pinned at the Office Board which stated that the Village was allocating wild farms to the residents of Pangani Ujamaa village, and that those who are interested should make an application. PW1 said he wrote an application letter requesting to be allocated a farm of 100 acres size. The application letter were tendered and admitted as Exhibit P1. PW1 stated further that his request was granted and the village allocated him a piece of land with a size of 35 acres. That, he has the document to prove ownership which is the letter from Ujamaa Village of Pangani, agreeing to grant PW1 a piece of land with a size of 35 acres. The letter which was signed by the Chairman of the Village and the Secretary was admitted as Exhibit P2.

PW1 stated further that he paid TZS. 18,500/= as a contribution for village development and was issued with a receipt which he tendered and

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was admitted as Exhibit P3. He prayed to be declared the lawful owner of the suit property measured 35 acres located at Pangani, Kibaha, Pwani.

In cross examination, PW1 stated that the disputed area is at Pangani, Kibaha Pwani and his piece of land is sized 35 acres. He said that it is not specifically stated how much the three defendants have trespassed into his land but insisted that they have trespassed.

PW2 was Mohamed Ally Mbonde who is also the 4th plaintiff. He stated that, his piece of land was invaded by three people who are the defendants. That the size of his piece of land is 40 acres. That he got the farm in 1993 when visiting in Pangani, he saw an advertisement at Pangani Village Office about allocation of wild farms. That he responded and wrote an application letter requesting for allocation of land. That he requested for 80 acres but was allocated 40 acres only.

He said that he was directed to pay for the village development fee which was a condition for land allocation and was issued with a letter of ownership of allocated land by the Village Government. He tendered the request letter and allocation letter, with a receipt of TZS 22,000/= which were admitted as Exhibits P4, P5 and P6 respectively.

In cross examination, PW2 stated that he did not know whether the land which was allocated to him was surveyed or not. He admitted that, *Ally*.

in the Complaint, he did not specify his 40 acres of land, but they are included with other plaintiffs' areas which makes a total of 300 acres. He said further that all three defendants have trespassed into his land.

PW3 was Athumani Ahmed Mnubi who is the 2nd plaintiff. His evidence was similar to the one by PW1 and PW2. He stated to be allocated the farm land in 1992 by Pangani Village, Kibaha, Pwani. That he saw an advertisement at the Village Office, asking for the interested residents to apply for land allocation in the village. That he wrote requesting letter to Pangani Ujamaa Village. That he requested for 60 acres farm, and later he received a letter from the said Village that he was allocated 50 acres of land, and that it was in 1993. The letter was signed by the Village Chairman called Andrew Moyo.

That after being allocated the said land, he paid for village development, about TZS.18,500/=. He tendered the request letter, allocation letter and a receipt which were admitted in Court as exhibits P7, P8 and P9 respectively.

In cross examination, PW3 stated that he is defending his rights against three people, namely Nestory, Mary Masuha and Immaculate Semes. That the three defendants have placed a guard at his farm and block his access to the said farm.

A. Moyo

In re examination, PW3 stated that their documents does not show boundaries because at the time of allocation, the area in dispute was unoccupied.

PW4 was Fatuma Ramadhani Bakari who is the 7th plaintiff. She told the Court in testimony that in the year 1993 she was in Pangani and saw an advertisement at Pangani Village Office inviting people to buy wild farms in Pangani Village for farming and livestock use. That she wrote an application letter and requested to be allocated 65 acres of farm land. That the Village Office accepted her request and allocated her 30 acres of land.

She said further that the Village Office accepted her request with a letter which was written to her. The letter was signed by the Village Chairman, Mr. Moyo, and one Sanzia, the Secretary. She said further that she contributed for the village development as a condition for land allocation. That, she paid TZS. 12,500/= and was issued with receipt. She tendered the application letter, the acceptance letter from the village office and the receipt of payments, which were admitted in Court as Exhibits P10, P11 and P12 respectively. PW4 claimed that the three defendants trespassed into her land and demolished her hut, destroyed

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trees and crops therein. She prayed for justice so that she can get back her land.

In cross examination, PW4 said that she has built a hut in her allocated farm, but it was demolished. That, she reported to the Village Government where she found that it was the defendants who has trespassed and destroyed her farm. She maintained that her farm was located at Pangani.

Hawa Ibrahim Amas, the 6th defendant testified as PW5. She testified that she is claiming for her farm located at Pangani with a size of 30 acres. That she got the said farm in 1993 when she saw an advertisement at Pangani Village Office about farms allocation. That she wrote to Pangani Village Government a request letter requesting to be allocated a farm. The Village Government wrote back agreeing to locate her 30 acres piece of land. That, she paid for village development as instructed and was allocated a farm. She tendered a request letter, which was admitted as Exhibit P13, The letter from the Village Government was admitted as Exhibit P14, and the receipt as Exhibit P15.

In cross examination, she insisted that their claim is on the land located at Pangani Village not Vikawe. That the land which was allocated to her was a wild bush, there were no borders or neighbours. She said *Allu.*

that she didn't have any other documents of ownership beside the one she has tendered in Court.

Ally Said Mayubi, the 3rd plaintiff testified as PW6. He said that he got information that there are wild farms which are being allocated by Pangani Ujamaa Village. That it was in 1993. That he went to Pangani and wrote an application letter to Pangani Village requesting to be allocated a farm land. That, Pangani Village accepted his request and allocated him 50 acres of farm land. That one of the village condition was to pay for development which he did, he paid TZS. 19,500/= and was issued with a receipt. He produced in Court his application letter, the Village approval letter and the payment receipt which were admitted as exhibits P16, P17 and P18 respectively. He further said that his farm has been invaded by the defendants who have put the security guards around the farm and he has no access to it.

In cross examination, he said that the farm land (suit property) is at Pangani, not Vikawe. He admitted that the village letter allocating him the farm did not state the location of the allocated land but he know his 50 acres of land is within Pangani Village.

PW7 was Akili Athumani Maliesi. He stated that in the year 1993 he was living at Pangani Village. He was a member of Pangani Village *Ally*

Government. That, Pangani Village Government advertised for land allocation to the interested people. The procedure was for the interested party to write an application letter and submit it to the village office. Then after receiving the requests, the procedure was for the Village Chairman to call a meeting to discuss the requests, and collect money paid by the applicants being contribution for village development. The meetings were held by a Committee which was summoned by the Village Chairman. PW7 said further that at that time, the Chairman was one called Moyo and his Secretary was called Sezia.

That, after discussing applications/ requests and approval for land allocation, they prepared Minutes, which remains in the Village Office for record. PW 7 stated further that he was the one who prepared Minutes of the Committee meetings. He identified the said Minutes in Court as it contains his name (PW7) and the names of the Village Chairman and Secretary who have authority to sign and have signed the said Minutes. He tendered the Minutes which were admitted in Court as Exhibit P. 19.

In cross examination, he denied to know the defendants. He said he was a cell leader at Pangani from 1985 to 2000. He said further he don't know the size of the wild area which was allocated to the plaintiffs

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but it starts at Mitamba, to Machinjio, to Game Reserve. He admitted that the land allocated to the plaintiffs was measured by feet.

PW8 was Faki Amani Faki. He said that he was a member of Pangani Village Government from 1985 to 1994. That among his duties were allocating the village land to the interested people. He said that the Chairman of the Village at that time was Moyo and his Secretary was Sazia. He remembered some of the people who were allocated land to be Musa Mkwaya, Mohamed Mbonde, and Athuman Charles. He identified the named people in Court.

In cross examination he said that the Village allocated the land in the forest which was there at Pangani. He said he didn't know the size of the forest. He said there were other people's farms near the area which was allocated to the plaintiffs. He said he don't know the defendants.

PW9 was Hemedi said Ngenje, who is the 8th plaintiff. He also testified that the defendants have trespassed into his farm sized 35 acres which he acquired in 1993 by being allocated by Pangani Ujamaa Village.

That, he saw an advertisement at the Village Office and wrote a request letter as per requirement. That after a week, the Village Office replied with a letter informing him his request was approved and that he was allocated 35 acres only of farm land. That as per the requirement, *Alls*

he paid for village development, a total of TZS. 16,500 and was issued with a receipt. He tendered his request letter, the Village letter and the receipts which were admitted as exhibits P20, P21 and P22 respectively. He said further that the defendants have trespassed into his land and forcefully evicted him.

PW10 was Musa Mkwya Tindwa who is the 5th plaintiff. He testified that in 1993 he was allocated a piece of farm land by the Pangani Ujamaa Village after he requested for it. That the size of the farm is 30 acres and after having been allocated, he paid a total of TZS. 16,000/= for village development. He tendered his application letter, the letter from the Village approving his request and allocating him the said farm and the payment receipt. The same were admitted in Court as Exhibits P23, P24 and P25 respectively.

He claimed that the three defendants have trespassed into his farm, slashed and destroyed crops. That, he reported the incident to Pangani Village Office who advised him to institute this case.

After the plaintiffs' evidence, the defence case opened whereby eight (8) witnesses including the defendants testified in Court.

DW1 was Zakaria Bupamba. He gave his evidence by witness statement which was adopted in Court. In the statement he said that he

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has come to testify for the 1st defendant who has employed him in his farms as a labourer and that the suit land is lawfully owned by the 1st defendant.

DW2 was Rugenzi Jimija Mpemba who testified briefly through his witness statement that he was a witness when the 1st and 2nd defendants were buying their disputed lands. He said further that he has worked for the 1st defendant keeping his farms hence he is assured that the farms belong to the 1st defendant.

Jitihada Ndyali was DW3. He testified through witness statement and said that he is Pangani Street Chairman since 2009 until now. He said that he has lived in Pangani since 1970 so he knows the place very well. He said that he knows all the defendants in the suit. He said that the 1st defendant owns the farms in Pangani Village now Pangani Street and he has been owner and resident of Pangani since 1997. He said further that he don't know the plaintiffs. That as a Street Chairman, he have a register of the residents of Pangani, but the plaintiffs are not Pangani residents and he have never seen them until when they came to Street Office to serve the Court summons.

DW4 was Joseph Nestory Isaka, who is also the 1st defendant. He testified by witness statement which was filed and adopted by the Court

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as evidence in chief. In the statement, DW4 stated that between March and April 1997 he bought a piece of land at Pangani Village, Kibaha, Pwani, with size of 100 acres. That he bought the said land from various people namely Khalifa Ali Mfaume, Mkenzi Nduba, Ally Ibrahim Mkemi, and Binzika Katemi.

That his neighbours are on north; Vicent Mwahu Semesi and Masuha, on west; there is Michael Kimisha and Ally Ibrahim Mkemi, on the south; Ndalio, Masuha and the road leading to the cattle farm owned by the Government and on east; the cattle farm.

That the said people who sold him that piece of land were the residents of Pangani Village, and he bought for TZS. 500,000/=. He said that he entered sale agreement with the said vendors. He prayed to tender a copy of sale agreement between him and Ali Mfaume. He reasoned that the original agreement was lost and he reported the loss to the Police. He also prayed to tender the Police Loss Report. The said documents were admitted in Court as Exhibit D1 collectively. He also tendered the Police Loss Report on the sale agreements by Mackenzie Ndumba, Katemi Binzika and Ali Mkemi. The three Police Loss Reports were admitted collectively as exhibit D2.

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He testified that, after buying the land, he sent application letter to the Government of Pangani Ujamaa Village requesting to survey the said land. That, the Village Government consented through the Minutes, and a letter to approve the survey of the land. The documents were admitted in Court collectively as Exhibit D3. He said further that he succeeded to survey the land and was issued with a Survey Map No. E. 359/116 dated 14/2/1993 with Registration No. 3118. The survey map was tendered and admitted in Court as Exhibit D4.

DW4 stated further that, he applied for the Title Deed where he was granted a Letter of Offer on 02/10/2003. Later, he requested and was approved to divide the farm into two parts where he surrendered the previous Letter of Offer, and was granted two Letters of Offer. He was then granted two rights of occupancy for the farm. The two farms were registered as Farm No. 1579/1, with Title No. 58532 and Title No. 58474 for Farm No. 1579/2. The letters of offer and one application letter were tendered and admitted collectively as Exhibit D5.

DW4 stated that in 2004, Pangani Ujamaa Village was formalized and added as part of the Town Council of Kibaha, and it was renamed as Pangani Street. So DW1 was required to change the use of his land from the farms, so the farms were to be resurveyed in accordance with Town

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Plan. He surrender the Title Deeds after writing a letter to the Street Government for approval. That, with the 2nd defendant, they made/drafted a Map for Town Plan for change of use of farms, and as of now, the farms have been resurveyed for various uses. He tendered the Deed of Surrender of Right of Occupancy which were admitted collectively as Exhibit D6. He said further that he has been paying land rent and tendered ten land rent payment receipts which were also admitted collectively as Exhibit D7.

DW4 stated that the plaintiffs started to trespass into his land from the year 2020, when they invaded the farms, destroyed the crops and started sand mining. That he reacted by reporting the matter to the Police and putting the security guards to protect the farms.

He said that he has incurred a big loss from the acts of the plaintiffs. He denied to have trespassed into the plaintiffs' land as the said land is lawfully owned by him. He prayed for the Court to dismiss the suit with costs and grant the reliefs in his counterclaim.

In cross examination by the counsel for the plaintiffs, DW4 admitted that in the sale agreement (Hati ya Mauzo), there is no description of the size of the land, and no description of the borders of the land. He added that he knows the boundaries of his farms. He added that the size of this

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surveyed land is on the Title Deed so, the size is clear. He said that, in his evidence, he has not shown where the vendors of his land got the farms which they sold to him.

DW5 was Immaculate Sware Semesi, the 2nd defendant. She testified by witness statement which were filed and adopted in Court.

She stated that she is the administratrix of the late Vicent Mwahu Semesi who is her father. That he died in 26 September 2005 and in 13 February 2006, she was appointed as an administratrix of her late father's estate. She tendered a copy of the letter of appointment as administratrix of the estate of late Vicent Mwahu Semesi. The copy of that letter was admitted as Exhibit D8.

DW5 stated further the land in dispute was owned by her late father and later it was transferred to her name as a personal legal representative following her appointment as administratrix. She tendered a photocopy of a Certificate for Approval of a Disposition of right of occupancy, which was admitted as Exhibit D9. DW5 said that in 2004, Pangani Ujamaa Village was replanned and placed under Kibaha Town Council, and changed into Pangani Street. Hence, the owners of farms had to change the land use and re survey their pieces of land in accordance with the town plans. That

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DW5 surrendered the Title Deed of her farm to the Commissioner for Land for the purpose of change of land use.

That after surrender of the Title, the Town Council approved for resurvey of the land, hence she collaborated with the 1st defendant (DW4), to draft a Deed Plan, and that as of now, each have a map of their area/pieces of land. She tendered a photocopy of letter from the Ministry of Land which approved the change of use of land. It was admitted as Exhibit D10. She produced also a photocopy of Deed of Surrender of Right of Occupancy, which was admitted as Exhibit D11, a photocopy of the Title Deed (Certificate of Occupancy) which was admitted as Exhibit D12.

She also produced a Sale Agreement which has name of her late father as the buyer and Godfrey Isaya Muna as the vendor, together with the transfer of a right of occupancy from Godfrey Isaya Muna to Vincent Mwahu Semesi, which were admitted collectively as Exhibit D13.

DW5 stated that, the trespassers started to encroach her land in 2018. That in 2020, one Joseph Elias Mwingira trespassed into her land claiming that he has bought the same. That, DW5 instituted Land Case No. 98 of 2020 in this Court where this Court declared her as the lawful owner of the suit land. She tendered the judgment of that case, and it

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was received by this Court for judicial notice. She denied to have trespassed into the plaintiffs' land and stated that she is the lawful owner of her piece of land. She prayed for the dismissal of the suit with costs.

Upendo Lawrence Kiwelu, testified as DW6. She said that she is a Land Officer working at Kibaha Town Council. She said she knows the 1st and 2nd defendants, that according to her office's records, they own pieces of land located at Pangani Street, Kibaha District. That, the 1st defendant's land was individually surveyed in 1997 and he requested for approval of the survey, which was approved by the Town Council. That after survey, the 1st defendant's farm was divided into two plots, and her office issued the 1st defendant with Title Deeds No. 58532 and No. 58474.

That for the 2nd defendant, her land was surveyed since 1992 and was issued with Title Deed No. 40234.

That the 1st & 2nd defendants surrendered their farms Title Deeds in 17 September 2014 for the purpose of change of use, from farms to the use according to town plans, as per the directives of Government Notice No. 352 of 2014. That upon surrender of their farms' Title Deeds, the Office of Town Council Kibaha, recognized the 1st and 2nd defendants as the owners of their farm lands.



In cross examination, DW6 said Sware Semesi (2nd defendant) owned about 40.073 hectares which is equivalent to about 102 acres. She agreed that, her office can issue two Title Deeds in one farm if that farm is subdivided.

After the closure of the 1st and 2nd defendant's case, the 3rd defendant opened her defence, and one Nkonze Eliud Masuha, testified as DW7. His witness statement was adopted in Court as his examination in chief in which he stated that, he is the son and administrator of the late Professor Reginald Masuha who passed away in 2013.

He stated further that in 2016, he wrote a letter to the Local Government requesting for the survey of land at Pangani Street. That the land is Land No. 644 with Title Deed No. 40278 which was the property of his late father. That, a meeting was convened by the Development Committee of Pangani which granted his request for the survey of disputed land. That the office of Land Commissioner at Kibaha, advised him to surrender the Title Deed so that he can be granted the permit for survey which he did. That after surrender of the Title Deed, the process of survey is still going on until now. He said that the plaintiffs claims that his mother, the 3rd defendant has trespassed into their land has no basis, and he prayed for the Court to dismiss their case with costs.

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DW8 was Mary Nicodemo Masuha, the 3rd defendant. She testified by witness statement and stated that, she is the wife of the late Professor Reginald Masuha who passed away in 2013. That among the possessions he left his family was farms and land located at Pangani Village, Kibaha, which he bought from some villagers in 1988. That, in 1990, the late Prof. Masuha, wrote a letter to the Local Government requesting for survey of land, a request which was granted. That the land was surveyed and granted Title No. 40278.

That, they have lived and used the land happily until 2021 when she received summons to appear in Court on the claims that she has trespassed into the land which is owned by her late husband and under the administrator of the estate who is her son. She prayed for the plaintiff's claims to be dismissed with costs.

The parties through their counsels filed their final submissions which I have considered in my findings and decision.

After hearing the evidence from all parties to the suit, the Court visited the Locus in quo so as to get enlightened to the parties' claims. The Court observation was that the plaintiffs claims to own the areas, which are also being claimed by the defendants to be their areas. In other words, the plaintiffs and the defendants' land dispute is on the same area, *Alla*

a vast land within Pangani Street (which was formerly Pangani Ujamaa Village), Kibaha District, Pwani Region.

After going through the evidence, both oral and documentary of parties to the suit, now this Court has to determine the issues in dispute in this suit.

The first issue is who is the lawful owner of the suit land?

The evidence by the plaintiffs shows that they are the rightful owners of pieces of land measured 300 acres located at Pangani, Kibaha. That on divers dates in 1993, the Pangani Ujamaa Village divided the forests and pieces of land and allocated them to the plaintiffs, in different sizes of acres, totaling 300 acres. In the plaint, the exact location of those forests and pieces of land is not revealed or mentioned. The plaint stated generally that the land (suit land) is situated at Ujamaa Village, Pangani Ward in Kibaha District.

The plaintiffs claims that their ownership is proved by Exhibits P1, P2, P3, P4, P5, P6, P7, P8, P9, P10, P11, P12, P13, P14, P15, P16, P18, P20, P21, P22, P23, P24 and P25.

These documents are letters of request for land from the plaintiffs to Pangani Ujamaa Village Government, the letters of Reply from the said Village Government replying to the plaintiffs, approving their requests and

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allocating them pieces of land, and receipts for the plaintiffs' contributions for village development as part of condition for land allocation. These exhibits does not also reveal the specific location of the land which was granted to the plaintiffs.

I will reproduce the contents of Exhibit P1 where the 1st plaintiff Charles Kyaruzi is requesting for a piece of land;

"YAH: MAOMBI YA ARDHI KWA AJILI YA KILIMO
NA UFUGAJI KIASI CHA EKARI MIA MOJA TU."

Exhibit P2, the letter from Village Government states/replies as follows;

"KUWASILISHA MAJIBU YA MAOMBI YAKO YA
ARDHI YA KILIMO NA UFUGAJI ..."

HUSIKA NA KICHWA CHA BARUA HAPO JUU
NDUGU CHARLES KYARUZI UMEKUBALIWA
KUPATIWA ARDHI YA UKUBWA WA EKARI (35)
THERATHINI NA TANO KWA MASHARTI
YAFUATAYO (1) KULIPA GARAMA ZA KUKATIA
MIKUZA (2) KUCHANGIA MAENDELEO YA KIJIKI
UTAKABADHIWA IWAPO UTAKIDHI MASHARTI YA
BARUA HII ..."

The letter above was signed by the Village Chairman and Secretary.

As said earlier, each plaintiff has produced in Court these documents as proof of their ownership of suit land. However, these ownership

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documents does not specify or clarify on exactly which location of a piece of land or wild farm the plaintiff was allocated.

In their testimony, when PW1 (1st defendant) was giving his evidence in chief, he did not gave the description of the location of his land. He did not state the borders of his claimed land. He just said his land is 35 acres and is located at Pangani, Kibaha. The same is of PW2. He did not gave proper description of his land in his examination in chief. PW3 also simply stated that his area is located at Kijiji cha Ujamaa Pangani, Pwani. It was during cross examination when he said that his neighbours for now are Charles Kiaruzi on the South, Mzee Mbonde on the North, and the road on the South. PW4 also did not describe the location of her claimed 30 acres of land and its neighbourhood.

PW5 also never described or identified the borders and demarcation of her land in her evidence in chief. In cross examination, she said that at time of allocation, the land was wild bushes with no neighbours. PW6 also did not specify the exact location of his land during his evidence in chief. In cross examination he said that he don't know the size of the other plaintiffs' land. PW9, in evidence in chief, did not clarify/state his neighbours, but during cross examination he said that his neighbours are Ibrahim Tindwa/Mkwaya, main road and cattle farm. *Alle*

PW8, Faki Amani Faki who was a member of Pangani Village at that time i.e. in 1993, tendered Minutes of the Village Government which approves the allocation of land to the villagers and non- villagers. The Minutes which were admitted as exhibit P19, shows that the borders of area which was allocated are, to the North Ally Pumbuli (who did not testify as a witness), On the North, Maliasili, on the West, Masolwa/Ibrahim Mkemi and on the East, Cattle farm (Shamba la Mitamba).

However, the occupation of the plaintiffs is not clear on the said area. Where exactly do the plaintiffs owns within the generally described area? As I have observed, even the plaintiffs themselves have offered general description of the location of their purported pieces of land but not specifically.


I should point that, at one time during the initial stages of proceedings of this suit, the defendant raised a point of Preliminary Objection over the proper description of the suit property in the plaint. This Court overruled the preliminary objections and in its Ruling dated 02 June 2022, found that the plaint contains the minimum details which describe the suit land. This finding of the Court was based on the fact that, at that stage, any ascertainment of facts particularly on description

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of the exact location of the suit property attracted evidence which disqualified the raised preliminary objection.

However, during the hearing where the party has to adduce evidence to prove their claims, it was expected that the plaintiffs would have given specific description of their suit lands particularly in their evidence in chief. It is in evidence of some of the plaintiffs, that at the time of allocation in 1993, the land was unoccupied. However, this suit was instituted in 2021, hence the plaintiffs could have easily described the location of their suit plots.

Another issue which have raised concern of this Court, (beside the question of description of suit property), is the conducts of the plaintiffs after they have purportedly been allocated the suit land each in 1993. According to their evidence, after allocation of the farms the plaintiffs have developed the farms by cultivating various crops.

It is stated in the Plaint that on unknown day of 2021, the defendants forcefully and illegally invaded the farms occupied by the plaintiffs. As per the plaintiffs evidence, they have been in occupation of this land since 1993, carrying on farming activities. However, it is the evidence of the defendants that they are the lawful owners of those pieces of land in dispute. 

The 1st defendant testifying as DW4, claimed to occupy a piece of land at Pangani Ujamaa Village, which he bought from various villagers in 1997. He produced a photocopy of the sale agreement of the farm he bought from Khalif Ali Mfaume which was admitted as Exhibit D1 collectively. In the same year 1997, DW4 requested for the individual local survey of his farms, by the letter. The Village Government of Pangani met on 03/12/1997 to discuss his request and approved it.

He wrote a letter to the Land Officer, Kibaha District in 21st September 1998 requesting to be granted the Title Deed on the farms after he have surveyed the same. He was issued with a letter of a Right of Occupancy on the farm registered as farm No. 1579/1 as per Exhibit D5 collectively. He have been paying land rent on the farms, evidenced by the receipts dated from 2006-2015, as shown at Exhibit D7 collectively. He surrendered the said Right of Occupancy on the farm in 2015 for change of use of land as per directives of Planning Authority which is Kibaha Town Council.

The similar evidence was adduced by the 2nd defendant through Exhibits D8-D13. She has shown that the original owner who was her late father bought the disputed piece of land in 1997 and a Certificate of Occupancy was issued in 1991 to one Godfrey Isaya Muna who was the

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vendor who sold the land to the late Semesi Sware. Exhibit D12 shows that, after purchase, the transfer of occupancy was effected and the land was transferred to the late Vincent Semesi Sware, and after his demise, the title was passed over to the 2nd defendant Immaculate Sware Semesi as a legal representative of her late father. This was done in 2018. And in 2018-2019, the Right of Occupancy was surrendered for change of land use.

At all this time where were the plaintiffs? I ask this for the reason that, according to the evidence of the defendants, particularly the 1st and 2nd defendants, they have been occupying the land in dispute since 1997 and they have done all the development including the surveying, resurveying, registering of their pieces of land, while the evidence of the plaintiffs seems to end on the date they were purportedly allocated their pieces of land in 1993, and emerged in 2021 when the defendants purportedly trespassed into their land.

It is the cardinal principle of law that he who alleges must prove. This is embedded under Section 110(1), (2) of the Evidence Act, Cap. 6 R.E 2022 which provides;

110(1); *whoever desires any court to give judgment as to any legal right or liability* *Adls-*

dependent on the existence of facts which he asserts must prove that those facts exist.

110(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Guided by those provisions of law, I feel that I should point that in civil cases, the law places a burden of proof upon a person who desires a Court to give judgment in his or her favour and such a person who states the existence of facts has to prove existence of those facts. Such fact is said to be proved when in civil matters, its existence is established by a preponderance of probability. (See the decision of the Court of Appeal case of **Ernest Sebastian Mbele vs. Sebastian Sebastian Mbele**, Civil Appeal No.66 of 2019 CAT Iringa (Unreported) in which this cardinal principal on burden of proof on balance of probabilities was set).

The Court of Appeal in the cited case of **Ernest Sebastian Mbele (supra)**, when illustrating on the proof on balance of probabilities or preponderance of probabilities, quoted with approval the Indian case of **Narayan Ganesh Dastane vs Sucheta Nayaran Dastane** (1975) AIR (SC) 1534 that,

*"The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that ... **a fact is said to***

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be proved when Court either believes it to exist or considers its existence so probable that a prudent man ought to act upon the supposition that it exists. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. (emphasis added).

Applying this above principle in the case at hand which I am bound to do so, I can say that I am faced with conflicting probabilities concerning an issue as to who is the lawful owner of the suit land. As said earlier, the Court visited the locus in quo, not as a witness but as an observer. It turned out the areas claimed by the plaintiffs, are also the same which are claimed by the defendants.

Having gone through the evidence of both sides of the suit i.e. the plaintiffs and the defendants, I find that the plaintiffs have failed to prove on a balance of probabilities that they are the lawful owners of the suit land. The reasons for my finding are as follows;

First, the plaintiffs have not managed to establish in their evidence in Court that the areas which they pointed to the Court on the locus in quo, they own them lawfully. This is for the reasons I have already stated that

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the documents of ownership Exhibits P1-P25 does not give description or location of their lands. Even Exhibit P.19, the Village Minutes, only give general description.

Second, the actions of the plaintiffs, made the Court, acting as a prudent man, to see the probabilities that the land in dispute was not owned by them. This is for the reason that, a man who has owned a land since 1993, as the plaintiffs' claims, could have been aware of any activities going on in their land. The defendants have established to own the disputed land since 1997, and 1998, surveyed and resurveyed it and eventually registered the land. This evidence was cemented by a Land Officer from Kibaha Town Council who testified as DW6.

The plaintiffs stated that their land was invaded in 2021. The defendants responded that it is the plaintiffs who have invaded their lands since around 2018 to 2020 and they were forced to take security measures to guard their property.

On those reasons, I am satisfied that on the balance of probabilities, the plaintiffs are not the owners of the land they claim.

The first issue is answered that the plaintiffs, (since it is the plaintiffs who have to prove), are not the lawful owners of the suit land.

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In his defence, the 1st defendant filed a counterclaim, which was tried alongside the main suit. According to his evidence, which I have already analysed herein above, I find that the 1st defendant has managed to establish on the preponderance of probabilities that he is the lawful owner of his claimed piece of suit land.

The second issue is what reliefs parties are entitled to. It is my finding that the plaintiffs have not managed to prove their claims on balance of probabilities. For that reason, they are not entitled to any of the reliefs claimed.

The 2nd and 3rd defendants did not file counterclaim. In their defenses they just prayed for the dismissal of the suit with costs. The 1st defendant, has filed counterclaim and prayed for reliefs which I have reproduced herein above.

The plaintiff to the counterclaim is hereby declared the owner of the piece of land he claims. Also, a prayer for permanent injunction against the defendants to the counterclaim on the said piece of land (suit land) owned by the plaintiff to the counterclaim is hereby granted.

The plaintiff on the counterclaim is praying for payment of the sum of TZS 350 Million as specific damages for destruction caused to the suit property. However, the plaintiff did not manage to bring evidence to prove

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how he reached the amount of TZS 350, million. He did not prove to the Court how the suit property was destroyed and the extent of destruction and the loss caused by the said destruction.

It is trite law that special or specific damages must be specifically pleaded and strictly proved. (See the case of **Alfred Fundi vs. Geled Mango & 3 others**, Civil Appeal No. 49 of 2017 CAT, Mwanza (unreported) which held that special damages cannot be granted unless specifically pleaded and proved.) Guided by this principle of law, I find that the plaintiff to the counterclaim have failed to prove specific damages as required by law, hence this prayer fails for want of proof.

On the prayer for payment of general damages to be assessed by the Court, the plaintiff to the counterclaim left the assessment of general damages to the discretion of the Court, as he did not propose how much to be awarded.

In the case of **Anthony Ngoo and Another vs. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported), the Court held that;

"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence able to justify the award. The judge has discretion in the award of general damages. However, the Judge must assign a reason ..."



Basing on the said principle set in the referred case herein above, this Court has to assess the general damages basing on the evidence by the plaintiff. In his counterclaim, the plaintiff has stated that from May 2020, he discovered that the defendants to the counterclaim have unlawfully entered into the suit property. That they have demarcated and subdivided the property into small plots so as to sell them to the third parties, the acts which compelled the plaintiff to hire security guards to guard the suit property. The plaintiff to the counterclaim also claimed to have psychologically been tortured, have incurred follow up costs and legal consultations and emotional distress, and other damages.

In his witness statement, the plaintiff testifying as DW4 have stated that he have incurred costs in following up on this dispute, such as expenses of driving to the suit property at Pangani, Kibaha from his residence at Ununio, Dar es Salaam, the security expenses and other costs.

Having considered all what have been pleaded and testified in Court by the plaintiff to the counterclaim as the ground of my assessment on the general damages, I find the plaintiff to be entitled to a general damage of TZS. 60,000,000 (Sixty Million) only. I have considered the evidence that the encroachment on the suit property started since May 2020.

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The plaintiff to the counterclaim is also entitled to payment of interest at commercial rate of 21% on the awarded general damages above from the date of filing of this suit till judgment and from the date of judgment until payment in full. The plaintiff to the counterclaim is also entitled to the costs of the suit.

In the upshot, this Court dismiss the main suit with costs for reason that the plaintiffs have failed to prove their case. Plaintiffs to bear costs of the suit.

In the counterclaim, the Court hereby awards the following to the plaintiff in the counterclaim;

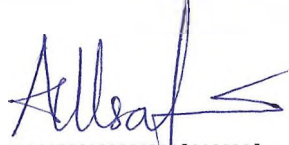
- i) It is declared that, the plaintiff in counterclaim is the lawful owner of his claimed piece(s) of land (suit property).
- ii) A permanent injunction is entered restraining the defendants to the counterclaim from entering and making any act(s) and or changes of whatsoever nature in the suit property.
- iii) The prayer for payment of specific damages has been refused for want of proof.
- iv) The plaintiff to the counterclaim is entitled to general damages of TZS.60,000,000/= (Sixty Million) from the defendants to the counterclaim.
- v) The plaintiff to the counterclaim is entitled to payment of interest at commercial rate of 21% on the awarded general damages herein

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above from the date of filing of this suit till judgment and from the date of Judgement until payment in full.

vi) Costs of this suit to be borne by the defendants to the counterclaim.

It is so ordered. Right of appeal explained.

A handwritten signature in blue ink, appearing to read 'A. Msafiri', with a long horizontal stroke extending to the right.

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A. MSAFIRI

JUDGE

17/8/2023