

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

LAND CASE NO. 8 OF 2018

JOAKIM JORAM MWAKYOLO.....PLAINTIFF

VERSUS

KIBOLE VILLAGE COUNCIL & 22 OTHERS.....DEFENDANTS

JUDGMENT

Dated: 12th November & 13th December, 2021

KARAYEMAHA, J

The plaintiff, Joakim Joram Mwakyolo, is suing the defendants for unlawful trespass and declaring ownership in his land measuring 599 surveyed acres and more than 600 unsurveyed acres located at Kibole kati and Ipasyo sub village within Busekelo District Council in Rungwe District in Mbeya Region.

It is alleged in the amended plaint that the plaintiff is a lawful owner of the land in dispute having purchased it from different people who lived with their families therein and sealed sale agreements with them. The sale agreements were admitted as exhibit P1 collectively. It is

stated that the land in dispute was approved by the Village Assembly on 9th November, 2015. Nevertheless, on diverse dates from 22nd, 24th and 25th January, 2018 to the date of filing this suit the defendants trespassed in the suit land and got hold of it forcibly. Their acts and conducts caused economic loss to the tune of Tshs. 20,000,000/= . His attempts to request them render vacant possession did not bear any fruits. Hence this suit in which the plaintiff prays for judgment and decree against the defendants jointly and severally as follows:

- (a) The declaration that the plaintiff is a lawful owner of the land in dispute.
- (b) The declaration that the defendants and their agents are trespassers over the suit premises.
- (c) The permanent order of injunction restraining the defendants and their agents from trespassing into the suit premises.
- (d) An order of eviction against the defendants and their agents to vacate the disputed land.
- (e) An order of setting aside the defendants' action and their agents' action for illegal and unlawful surveying and re-surveying and mapping and re-mapping the plaintiffs' land.

- (f) An order to pay Tshs. 20,000,000/= for the destruction of paddy crops and restriction to plant several crops.
- (g) An order to pay the costs of the suit.
- (h) An order for any other reliefs that this honourable court deems just and fit to grant.

On the other hand, the 1st defendant has sturdily resisted the plaintiff's claims in her written statement of defence (hereinafter the WSD) to the amended plaint, wherein she argued that the land in dispute is a long standing village reserve. She averred that the plaintiff after trespassing was called for verification of his land but turned a deaf ear and ignored the calling. She stated further that the purported sellers never owned the forest area and the dubiously acquired customary lease of occupancy were declared void and nullified by the Commissioner of Southern Highlands because were never issued by the legally known authority. The court has, therefore, been urged to dismiss the suit in its entirety with costs.

Likewise, in their WSD to the amended plaint, the 2nd to 22nd defendants jointly denied the allegations mounted by the plaintiff against them. They stated that the plaintiff has never possessed land in Kibole kati and Ipasyo sub villages because there is no evaluation report.

They wondered how they could act in the shoes of the 1st defendant which is the statutory body capable of suing and being sued and were not leaders of the same. They therefore prayed the plaintiff's case to be dismissed with costs.

When the suit was called on for hearing, the appellant appeared in person whereas the 1st defendant was represented by Mr. Peter Salama learned counsel and Mr. Kevin Gamba learned counsel represented the 2nd to 22nd defendants.

During the final pre – trial conference stage, it was agreed upon by the learned Counsel representing parties and approved by the court that the suit gives rise to four issues. They are:

1. Who is the legal owner of the disputed land?
2. Whether the title deed annexed on the plaint are valid or not.
3. Whether the plaintiff has a cause of action.
4. To what reliefs are parties entitled to.

To prove the plaintiff's allegations leveled against the defendants, the plaintiff testified as PW1 and called two other witnesses, namely, James Aron Mwanyila (PW2) and Japhet Molo (PW3).

In his evidence to establish his claims, PW1 testified that he bought the disputed land from 39 vendors which was invaded by the

defendants and termed it as a village land. To prove his assertion he tendered sale agreements which were admitted as exhibits P1 collectively. He also tendered six title Deeds of Customary Right of Occupancy which were admitted as exhibits P4 collectively in a bid to prove ownership over the land in dispute.

On cross-examination when he was asked on who made evaluation, PW1 told the court that it was him who made the valuation of 599 acres which were invaded along with 600 unsurveyed acres. He, however, conceded that sale agreements do not show the total amount of hectors and some do not indicate the date of sale. He, moreover, quickly deposed that there is no law requiring the sale agreements to indicate the size of the land. The witness testified further that the destruction caused a loss of Tshs. 20,000,000/=. From what he understood, the village council allocates land and in his case the Village Executive Officer (hereinafter the VEO) is a signatory. He contended that he applied for the Customary Right of Occupancy and was awarded the same by the village council through its meeting held on 9th November, 2015. He continued stating that the title deeds were issued under the Land Act not Village Land Act. However, he changed and stated that the same title deeds show that they were issued under the Village Land Act

and the Village Land Regulation GN of 2002 Regulation 76 (1). He wound up by conceding that exhibit No. 2 Title Deed No. 85 ANG/4662 indicates the land measuring 95 hectors.

In his testimony, PW2 told the court that he was among the people who sold land to PW1. He testified further that the village council visited the plaintiff's farm after holding the meeting. While on cross – examination he stated that the price of his land he sold to the plaintiff was Tshs. 1,050,000/= but did not know neighbours and the size. He informed the court that he was the member of the village council.

Japhet Molo (PW3) testified to the effect that on 15th January, 2018 was cleaning his farm when he was arrested by people and taken to the Primary Court. He asserted that the plaintiff's paddy farm neighbours his and both were maliciously damaged.

On cross- examination, PW3 admitted to know the land in dispute. He said that the plaintiff's farm is not part of the forest reserve. He insisted that the plaintiff bought the land from the village but did not know the size. He lastly stated that he worked for the plaintiff.

The evidence of the defence has come from 20 witnesses who, most of them are basically defendants. Joshua Ntego Mwandando (DW1) testified that he was born in Kibole Village and became its

Chairman since 2019. He asserted that the Kibole Village reserve measuring 770.57 acres was invaded by Mwankante and cut trees. He declined to have allocated land to any person because there was no application tabled in the village council and passed by the village general Assembly. He stated while under cross examination that there was no any transfer of the land in dispute to anybody. He said the land in dispute could not be transferred because it is a forest reserve.

Tuntino Jairo (DW2) testified that the land in dispute is under the ownership of the village Government. The said land is a forest reserve, mountain and is a source of water. According to him, the plaintiff invaded it.

(DW3), one Philimon Chaula, the head of the Land and Natural Resource Department of Busokelo District Council, testified that the plaintiff was called by the District Executive Director (herein the DED) to submit documents in relation to the ownership of the land in dispute but never responded. He said that under the law Customary Right of Occupancy Title deeds are issued by the District Council. He denied to have issued one to the plaintiff.

On cross – examination DW3 contended that the land in dispute is a forest reserve with a mountain measuring 770.57 hectares the property

of the village. He deposed firmly that the Village General Assembly has mandate to decide who to be allocated land.

The next witness was Batlomeo S. Pamera (DW4) who testified that the land in dispute is a forest reserve and was never allocated to the plaintiff. DW4 testified further that in the period he was a member of the village Council, that is 2014 no Village General Assembly was convened to approve allocation of land to the plaintiff. According to him the former village chairman, namely Absolom Mwakanyamala allocated land in dispute to the plaintiff without endorsement of the Village General Assembly.

The following witness was Elia Nsagalufu Mwasandambo (PW5). He testified to the effect that the land in dispute belongs to Kibole Village and it is a reserved area. Being a member a member of the village council, the witness asserted that no Village General Assembly was convened to discuss the issue of allocating land to the plaintiff because they never got any application from the plaintiff. He dismissed exhibit P3 stating that original records of the village government are never given to anybody but remain the file record. On why he signed on exhibit P3, DW5 stated that because it was a list of people who went to witness the forest destruction.

Nodrin S. Mwakisyokile (DW6), Charles Herman Melele (DW7), Ospa Andendekisye Mwaijande (DW8), Shaban Angindile Mwakalebela (DW9), Edson Kasyupa Mwakajumilo (DW10), Baloki Afene Mwaikenda (DW11), Brown Martin Mwansyelage (DW12), Angyelile Roland Mwaipokela (DW13), Sofen Mwakalebela Ambangile (DW14), Job Enock Mwasambemba (DW15), Athuman David Mwakihwaje (DW16), Ombi Anyosise Mwaibwe (DW17), Adamson Ambangile Mwakalebela (DW18), Zabron Mbesela Mwamakimbula (DW19) and Bampele Mwansana Mwandaji (DW20) have similar story. They are all residents of Kibole Village having been born there. Like DW4 and DW5, the gist of their testimonies is that they knew forest reserve (land in dispute) as the property of Kibole Village. They boldly testified that nobody was allowed to conduct any activity in the reserved forest and mountain and was never allocated to anybody. They told the court that they have no land dispute with the plaintiff. They contested the plaintiff's allegation that they trespassed in his land because they went to the reserved forest to witness the destruction caused by some people. On getting there the village leaders arrested PW3 who was cutting trees in there. They were surprised why the plaintiff sued them.

Concisely, the foregoing has been the case for both sides.

After the closure of the defence case, the plaintiff prayed and was granted leave to file his final submission.

In his final submission the plaintiff reiterated what he stated in his evidence. He, however, contended that the deeds of sale contained the 1st defendant's seal hence complied with sections 26 (2) (a), 56 (1) (a) (b) of the Local Government (District authorities) Act Cap 287 (herein the Local Government Act). He submitted that by signing the document titled TAMKO, exhibit P2, the 1st defendant's members admitted that the land in dispute belongs to him. He relied on exhibit P3 to believe that the 1st defendant's members allocated the disputed land to him.

The plaintiff submitted further that he was issued six valid deeds of customary right of occupancy (exhibit P4 collectively) in terms of section 8 (5) of the Village Land Act Cap 114 by the authorities and in compliance with section 33 of the Land Registration Act Cap 334.

He argued that in allocating him the land in dispute, all procedures were followed and met from being authorized by the Kibole Village Assembly, Busekelo District Council, Rungwe District Council and the Commissioner for land together with official seals appended to the title deeds and are admissible in evidence as per section 6 of the Land Registration Act.

The plaintiff attacked the 1st defendant for failing to produce minutes of the village assembly to demonstrate that there was no allocation of the land in dispute to him and challenge the validity of six customary right of occupancy.

He argued adding that exhibit D1 a revocation letter by the Land commissioner of Southern Highlands nullifying the six customary lease of occupancies was not a revocation letter for the authority failing to issue a notice in terms of section 48 of the Land Act Cap 113 and was denied a right to be heard enshrined under Article 13 (6) (a) of the Constitution of the United republic of Tanzania, 1977 and section 172 of the Land Act. To buttress his view he cited the case of ***Agro Industries LTD vs. Attorney General*** (1994) TLR 43. He remarked that the said revocation was not published in the Government Gazette as per section 49 (1) of the Land Act and as was instructed in the case of the ***Town Director vs. Daniel Sekao*** (1988) TLR 22.

Regarding the 2nd to 22nd defendants, the plaintiff held the view that they trespassed in his land and arrested his casual labour Japhet Moro who was subsequently prosecuted at Ikama Primary Court for the offence of malicious damage to property.

Having gone through the evidence from both sides during the hearing and the plaintiff's final submission, this being purely a civil claim, the standards demand for proof on balance of probabilities as has been settled in many cases namely: ***The Attorney General vs. Eligi Edward Massawe***, Civil Appeal No. 86 of 2002, ***Ikizu Secondary School vs. Sarawe Village Council***, Civil Appeal No. 163 of 2016 and Paulina ***Samson Ndawavya vs. Theresia Thomas Madaha***, Civil Appeal No. 45 of 2017 (all unreported). In the case of ***Scania Tanzania Limited vs. Gilbert Wilson Mapanda***, Commercial Case No. 180 of 2002 (unreported) defined '*balance of probabilities*' to mean that:

"A court is satisfied an event occurred if it considers that on evidence, the occurrence of the event is more likely than not."

It is also a settled principle of law in Civil suits that, "*whoever alleges must prove*". Many cases have ascribed to this principle including the case of ***Kwiga Masa vs. Samwel Mtubatwa*** [1989] TLR 103.

This court is now tasked to use the foregoing evidence and submissions above to resolve issues that were framed during the final pre-trial conference as indicated herein above.

For reasons to be apparent I propose to begin with the 3rd issue in my disposal journey of this case which is whether the plaintiff has a cause of action. I shall discuss this issue mostly in relation to the 2nd to 22nd defendants. To start with, there is no disputed that the 2nd to 22nd defendants are residents of Kibole Village and when the cause of action arose they held no posts of leadership. It is also not denied that the plaintiff sued them on allegations that they trespassed in his land and arrested PW3 and destroyed his paddy maliciously. However, after examining the whole evidence, I am settled that neither the evidence adduced in favour of the plaintiff nor defendants, be it contextually or expressly, prove that the plaintiff has a dispute over the land in dispute with the 2nd to 22nd defendants. I say so because a land dispute occurs when two different people or separate entities feel like they both have a legal claim over a piece of land. It is a disagreement over the control or ownership of land between two or more people.

An eye bird scrutiny of the plaintiff's evidence shows that other than claims of trespass, he has no claim of ownership or possessory rights in land against the 2nd to 22nd defendant. The vexing question is whether this court has jurisdiction to entertain prayers sought by the plaintiff against them in this matter. Section 3 (1) and (2) of the Land

Disputes Courts Act, No. 2 of 2002 RE 2019 ("The Act") gives powers to the Court to entertain matters concerning land disputes. To do full justice, let me reproduce it hereunder:

"3.-(1) Subject to section 167 of the Land Act and section 62 of the Village Land Act, every dispute or complaint concerning land shall be instituted in the Court having jurisdiction to determine land disputes in a given area.

(2) The Courts of jurisdiction under subsection (1) include-

(a) the Village Land Council;

(b) the Ward Tribunal;

(c) the District Land and Housing Tribunal;

(d) the High Court; or

(e) the Court of Appeal of Tanzania."

The phrase '*dispute or complaint concerning land*' stated in the above provision has been interpreted by His Lordship Mlay J, (as he then was) in the case of ***Anderson Chale vs. Abubakar Sakapara***, Civil Appeal No. 121 of 2014 (unreported) to mean a matter which a right on land or interest thereon is in dispute. In a simple language, we can say it is the matter where ownership of the land or interests is in dispute.

In this case, it is categorical that there is no dispute pertaining to right on land or interest between the plaintiff and the 2nd to 22nd defendants. They had no disagreement about land boundaries or

interest in it which would invite sessions of settlement or failure of which would trigger any party to bring the suit to court for a final determination. The only wrangle is trespassing in his land by them. In my view the plaintiff had to sue them in another forum for a tort of trespass. The plaintiff is only locking horns with the 1st defendant where each side is claiming ownership or interest in the land in dispute. Having established that the plaintiff's claim is not based on ownership and or possessory right in land this court has no jurisdiction to grant his prayers against the 2nd to 22nd defendants.

In the whole, I hold and declare that the plaintiff has no cause of action against the 2nd to 22nd defendants. The suit against them is hereby dismissed with costs.

Let me now turn to issue number one which is *who the lawful owner of the land in dispute is*. In the due course I shall discuss issue number two *which is whether the title deeds are valid*. I have read thoroughly well the evidence and the final submission. It is apparent that the land in dispute stands in Kibole Village, Busekelo District Council within Rungwe District Mbeya Region. The emphatic defence evidence is that the land in dispute measuring 770.57 acres is the forest reserve, source of rivers and habitat of wild animals and birds.

In his evidence, the plaintiff deposed that he bought the disputed land from 39 people and tendered the sale agreements which were admitted as exhibit P1 collectively. However, what I gather from exhibit P1 is that the 39 vendors did not sell the forest reserve to the plaintiff. Similarly, exhibit P4 (customary right of occupancies), show that the plaintiff's farm is neighbouring the village forest reserve. In my firm view, the plaintiff is not certain on which land he bought. His oral evidence contradicts the documentary evidence tendered by him. The plaintiff has no any evidence in his basket to clear these discrepancies. Even PW2 did not offer satisfactory details of the piece of land he sold to the court hence of less help.

Now the question which comes to the fore is whether the Kibole Village allocated the land in dispute to the plaintiff. Whereas the plaintiff states firmly that the Kibole Village Assembly allocated land in dispute to him, the 1st defendant denies and holds the view that it could not allocate the forest reserve to him. To satisfy myself, I have keenly examined the plaintiff's evidence and I am satisfied that the 1st defendant is telling the truth. This is because the procedure to allocate land to any person by the village is very clear that the interested person must primarily lodge an application with the Village Council. In his entire

evidence, the plaintiff has not produced evidence to prove that fact or rather claim to have done so orally. On getting the application the Village council has to comply with the decisions that have been reached by any committee or other body on the adjudication of the boundaries to and rights in the land which is the subject of the application for a customary right of occupancy, establish whether it has power to grant acres sought. It must report to and take account of the views of the village assembly at the ordinary meeting of the village assembly. The village assembly will then approve the grant of customary right of occupancy. In this case the evidence before ME proves that the plaintiff did not make any application for land. Moreover, exhibit P3 and P4 indicate that he was allocated land by the village council but the Village Assembly did not approve it. This, then, contravened section 8 (5) of the Village Land Act which provides that:

"A village council shall not allocate land or grant a customary right of occupancy without a prior approval of the village assembly."

My observation is cemented by the evidence of DW1, DW2, DW3, DW4 and DW6 who told the court that there was no Village General Assembly convened to discuss the issue of allocating land to the plaintiff. Of course, there is also no tangible evidence from the plaintiff. I have to

emphasize that the procedure is clearly laid down on how to acquire land from the village. That procedure must be observed strictly and no step must be overlooked.

Another aspect which has considerably exercised my mind is in relation to the size of the farm the plaintiff bought from 39 vendors alleged to be approved by the Village Council and ultimately obtained customary right of occupancies rights. In his final submission and evidence the plaintiff averred that he owns 599 surveyed acres and more than 600 unsurveyed acres. This means he bought more than 1,199 acres. The plaintiff said that he valued the 599 acres himself. A worth note point is that valuer title is established under the Valuation and Valuers Registration Act, 2016. The valuer is bestowed with mandate to carry out valuation of properties upon request by individuals as per section 4 to 10 of the Valuation and Valuers Registration Act. On the strength of the statutory law, the plaintiff is not a qualified valuer otherwise he could have put some materials proving the same. I say so because he is known to be a Resident Magistrate. But all in one alleging the size of his land and value and having a duty to prove to the balance of probability the plaintiff was expected to tender evidence showing that his land was surveyed and valued not guessing the size and value.

I have passed through the sale agreements and noted that out of 38 sale agreements only 12 show that he bought 6 acres. 32 do not indicate the size of the land bought. Suppose he bought the maximum of five acres from each vendor. If so, from 32 vendors he bought 160 acres. Plus 6, the total purchased acres are 166.

Having noted that, I have quickly examined exhibit P4 deeply. Title deed No. 85RNG/4662 indicates 95 acres were granted, No. 85 RNG/4663 118 acres, No. 85 RNG/4664 105 acres, No. 85RNG/4665 87 acres, No. 85RNG/4666 76 acres and No. 85RNG/4668 118 acres. This means he was granted customary right of occupancy of 599 acres in total by the Village Council. In as much as he told the court that he bought all the land, the plaintiff has to account for the difference of 433 acres. Where he got them and who sold to him the extra acres. Apart from that the plaintiff told the court that he bought more than 1199 acres. Be it as it may, there is no evidence on that assertion. In my view the variance is too much to handle.

I have, at this juncture, many questions which have no answers. **One**, how many acres did the village council discuss and went to see on 09/11/2015. Was it 1,199, 599 or 166 and authorize the plaintiff to own. **Two**, what moved the village council to hold the meet while there was

no application from the plaintiff to acquire village land village? If the Village Council found it proper to convene the meeting was it a proper body to pass a resolution. DW3 undisputed evidence is that the Village General Assembly has mandate to decide who to be allocated land not the Village Council. Therefore, the contentions by the plaintiff and on his behalf stand unassailable. In the event exhibit P3 and P4 suffer from lacking evidential value hence unreliable.

The plaintiff contended in his submission that he has heavier evidence proving that he is the lawful owner of the disputed land. In my considered opinion, this is not true. The discussion above has eminently raised a lot of questions left with no answers from the plaintiff's evidence.

Stretching further, I think, the DED of Busokelo District Council, had a solution to the dispute had the plaintiff responded to his call as DW3 testified. Ignoring him has brought us to this stage and as matters stand his intervention is still very crucial.

To cum it all, I am convinced that the plaintiff has failed to prove to the balance of probabilities that the land in disputed is his property. In case any person sold it to the plaintiff, the sale was illegal and the

plaintiff is entitled to claim his money from the 39 vendors. After this discussion I am satisfied that issues number one and two are answered.

The last issue is to what reliefs are parties entitled to. Admittedly, the plaintiff has failed to prove that he is the lawful owner of the land in dispute. He has also failed to prove that acts and conducts by the defendants caused economic loss to a tune of Tshs. 20,000,000/=. In the event, the 1st defendant is declared the owner of the Kibole Village forest reserve.

In consequence, I dismiss the plaintiff's case with costs.

It is so ordered.

Dated at **MBEYA** this **13th** day of **December, 2021**



A handwritten signature in blue ink, appearing to read "J. M. Karayemaha", is written over a horizontal line.

J. M. Karayemaha
JUDGE