

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 202 OF 2015

KAWE MPIJI HABITAT GROUP.....PLAINTIFF

Versus

JOHN PAULO LYIMO & 26 OTHERS.....DEFENDANTS

Date of last order: 13/2/2018

Date of Judgment: 11/5/2018

JUDGMENT

MGONYA, J.

The Plaintiff **KAWE MPIJI HABITAT GROUP** though the service of Mr. Thadeo learned Advocate has filed the present suit against Defendants, namely **John Paul Lyimo and 27 others** for the course of action appreciated by the wording of paragraph 6 of the amended Plaintiff. For clarity, the course of action deserves to be quoted. It reads:-

"6.....the Defendants unlawful trespassed into the land in dispute and decided to make some developments on it but effects were made to drive

them away like reporting the matter to the Village and District Authorities and Criminal Cases against the trespasses but all proved failure.”

As is the procedure well prescribed under the provisions of **Order VII Rule 7 of CPC**, The Plaintiff prays for Judgment and Decree against the Defendants as follows:-

- a) The declaration that the Plaintiff are lawful owners of the land in dispute;
- b) Eviction order be issued to all the Defendants because they are trespassers;
- c) Permanent injunction whereby the Defendants, their agents or any other person claiming under them to be owners and occupier of the land in dispute be restrained from approaching, developing entering or laying their hands in any manner whatsoever in the dispute land; Kawe Mpiji Habitat Group.
- d) Monetary compensation to the tune Tsh. 10,000,000/= to (KMHG) Members totaling 300 people due to deny of land use from the time of its purchase to date;
- e) Costs of the suit be borne by the Defendants.
- f) Any other reliefs or orders this Honourable court deems just and equitable to be granted.

In this case, the Defendants are represented by Mr. Mbengane Stanford learned Counsel.

Pursuant to the provision of **Order XIV Rule 1 (5) of CPC** issues drawn and agreed by both parties in this case are as follows:-

- 1. Who is the lawful owner of the Land in dispute;***
- 2. Whether the Defendants trespassed the land in dispute;***
- 3. If the answers are in the affirmative or in favor of the Plaintiff, whether the Plaintiff is entitled to any compensation and to what extent;***
- 4. To what reliefs the Parties are entitled.***

In designed efforts to prove this case to the standard required in Civil litigations, the Plaintiff summoned only three witnesses, namely Emmanuel Antony Temba, herein referred to as PW1, Vestina Justin Mutugulwa, PW2 and John Bahera referred to as PW3.

Led by the learned Advocate, Mr. Revocatus Thadeo, PW1 testified to the effect that the Plaintiff has been registered under **the Cooperative Societies Act 2013** and possess its Constitution which the same were collectively admitted as **Exhibit P1**. He has referred the court on item 17 of the Plaintiff's

Constitution which prescribed for power vested to the Plaintiff to own properties. PW1 proceeded to testify that, the Plaintiff has a title deed in respect of **65 acres** and also has a Sale Agreement in respect of **11 acres** which are unsurveyed. The title deed was admitted as **Exhibit P2.**

As regards to 11 acres, PW1 successfully tendered the Sale Agreement which was admitted as **Exhibit P4.** For the Deed of transfer, PW1 testified that the same is in favour of 65 acres; which was admitted as **Exhibit P3.**

PW1 went on to testify that the Defendants have invaded the suit land. The 1st invasion, he said was done in 2006, where they successfully evicted Defendants. In 2008, PW1that invaders went back and they were removed. Further, PW1 testified that in 2009, the 1st Defendant and others were charged in **Criminal Case No. 45 of 2009** and they were sentenced. Copy of Judgment in respect of that case was admitted as **Exhibit P5.**

PW1 testified that, after delivery of the Judgment, the matter was taken to District Land and Housing Tribunal were the value of subject matter was found to be 25 Million Shillings hence the Tribunal had no jurisdiction. When Plaintiff was preparing to institute the matter in this Court, they found the Defendants have instituted the matter against Plaintiffs via **Land Case No. 232 of**

2009 which later was withdrawn by Defendants as per **Exhibit P6.**

PW1 told the court that here are a lot of expenses and great loss on the part of Plaintiffs since they have been tenants to different houses with massive rents; since initially They had plan to build houses on the suit property. They have also incurred some costs to hire an advocate to represent them.

Being cross examined by Mr. Mbegane, PW1 testified that Plaintiffs' Members are 300. He confessed that in the Ministry OF Land's records reveals that the registered owner of the disputed plot is one **REGISTERED TRUSTEES OF KAWE COMMUNITY DEVELOPMENT TRUST** and not **KAWE MPIJI HABITAT GROUP**. Further, farm of 11 acres is not under the Registered Trustees as the same is under the KAWE MPIJI HABITAT GROUP. As for 65 acres, PW1 testified that Plaintiff bought the same from one Agness Mwakiluma.

PW2 Vestina Justina Mutagulwa testified that while they were in the process of change of use, the land in dispute were invaded by Defendants. She prayed for the Plaintiff to be declared as lawful owner and compensation of 10 Million Shilling to each member and costs of the case.

During cross examination, PW2 admitted that the Registered Trustees was the one who bought the land on behalf of the Plaintiff since they were yet to be registered as a group.

The witness clarified further that even if the name appeared which has been registered in the title deed in respect of the suit property is one of the Registered Trustees of Kawe Community Development Trust, still the same cannot waive the ownership to Plaintiffs.

PW3, John Bahera testified that the land which were invaded belonged to Plaintiff possessed the titled deed and other letters which was for the change of use from farm to residential. He prayed for the court to declare KAWE MPIJI HABITAT GROUP as the rightful owner of the dispute farms and Defendants to pay Plaintiff compensation due to the said trespass. The witness also prayed for the costs of the suit be borne by the Defendants.

Being cross examined by Mr. Mbegane PW3 confessed that the Plaintiff was registered in **2003** and the property was bought in 2002. Further, they bought the first form from Agnes Mwakiluma for **65 acres** which the same was registered. The record farm was bought from Abdallah Ali Ngurungu in 2003. He maintained that the Registered Trustees bought the land on behalf of the Plaintiffs.

In defence, DW1 Zuberi Kijoga led by Mr. Mbegane testified that as per Exhibit P2 the owner of the land is **REGISTERED TRUSTEES OF KAWE COMMUNITY DEVELOPMENT TRUST.**

DW1 tendered Certificate of Occupancy in the name of the registered Trustees of KAWE COMMUNITY DEVELOPMENT TRUST which was admitted as ID I.

DW2, Saidi Abdallah Ngurungu testified that the farm at Kihamaka belongs to his father one Abdallah Ally Ngurungu who was located the said form by Kimaka Village Government.

Being cross examined, DW2 confessed that he has no any evidence to prove that the said land belonged to his father.

DW3, Mohamed Said Pachanja testified that they were located the land in dispute from the order of the Regional Commissioner of Pwani. It was testified that the land is not belonged to the Plaintiff. The witness prayed for the Court to dismiss the case since the same is meritless. He further prayed for the costs be borne to the Plaintiffs.

During cross examination, DW3 testified that Regional Commissioner has such powers of allocating land to the Defendants.

After concluding the hearing of the case, both learned Advocate submitted their written opinion and advised this honourable court accordingly.

At this juncture, I have with profound attentiveness carefully and considerably considered the evidence adduced by both parties and to a great extent the reasoned final submission of my learned friends, that's Counsel for the Plaintiffs Mr. Thadeo and Counsel for the Defendants Mr. Mbegane.

Now the task before me, of course is to state findings or decision with the reasons of each issues which were framed for purpose of determination.

As stated earlier in this judgment, the first issue reads "**Who is the lawful owner of the land in dispute.**"

It should be born in mind that the land in dispute referred to in this issue are; Farm No. 756 and 11 acres of the unsurveyed piece of land situated at Kerege Ward in Bagamoyo District at Kihakara Hamlet.

To start with, if I may quote, the wording of the provisions of **Section 110 (1) (2) and (3) of the Law of Evidence Act Cap. 6 R. E. 2002** provides:

110 (1) Whoever desires any Court to give Judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove those facts exist.

- (2) When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person;**
- (3) The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side”**

I am aware indeed that, in our legal fraternity, it is a cherished principle of law that, in Civil Case, the burden of proof lies on the party who alleges anything his favour. It follows therefore, the party with legal burden also bears the evidential burden balance of probabilities.

Since the 1st issue composed two pieces of land namely farm No. 756 and 11 acres of the unsurveyed land, I feel duty bound to state findings with the reason of each piece of land in dispute.

As regards to who is the lawful owner in respect of farm No. 756 which is registered Plot, the wording of the provision of Section 2 of the Land Registration Act Cap. 334 are useful to described who is an owner in law in a registered Plot.

"Owner: means in relation to any estate or interests the person for time being in whose name that estate or interest is registered."

Now the question is in whose name the estate or interest in respect of Form No. 756 is registered?

During Cross examination, PW1 admitted in his words that in the Land Ministry the registered owner of the disputed Plot is one Registered Trustees of **KAWE COMMUNITY DEVELOPMENT TRUST** and not **KAWE MPIJI HABITAT GROUP**. The subsequent confession was pursued by PW2 who admitted the fact that if the name appeared in title is one of **REGISTERED TRUSTEES OF KAWE COMMUNITY DEVELOPMENT TRUST** still the property belong Plaintiffs. PW3 clarified to the Court that the Plaintiff was registered in 2003 and the Plot was bought in 2002.

On the side of Defence, DW1 admitted that the owner of the Land i.e Farm No. 756 is one **REGISTERED TRUSTEES OF KAWE COMMUNITY DEVELOPMENT**.

As per Exhibit P2, the owner of Farm No. 756 at Mapinga Bagamoyo, District is one **REGISTERED TRUSTEES OF KAWE COMMUNITY DEVELOPMENT TRUST**. It follows therefore the estate or interest in respect of Farm No. 756 at Mapinga Bagamoyo

District has been registered in the name of **REGISTERED TRUSTEES OF KAWE COMMUNITY DEVELOPMENT TRUST.**

The next question, who is the Plaintiff in this matter, the answer is very clear as per exhibit P1 that the Plaintiff is one **KAWE MPIJI HABITAT GROUP** which as per the pleading referred herself as Non-Governmental Organization which possess its constitution.

It came across my eyes that as per **Article five, item 17**, the Plaintiff is capable of acquiring immovable properly and entering into contracts in its own name. It is a surprise to find the title deed has been registered in a different name from the Plaintiff.

Now in the spirit of the provision of Section 2 Cap. 334 and the weight of the content of **Exhibit P2**, I find that the owner of Farm No. 756 at Mapinga Bagamoyo District is one **REGISTERED TRUSTEES OF KAWE COMMUNITY DEVELOPMENT TRUST;** and not otherwise.

Turn to who is the lawful owner of 11 acres of the unsurveyed piece of land situated at Kerege Ward Bagamoyo District at Kiharaka; in order to establish the ownership of 11 acres the defence through DW3 Mohamed Said Pachanja testified that they were located the land in dispute from the order of the Regional Commissioner of Pwani. DW2 one Said Abdallah Ngurungu told the

Court that the form at Kiharaka belonged to his father one Abdallah Ally Ngurungu who was located by Kimaka Village Government.

On his part, the Plaintiff successfully tendered the Sale Agreement which was admitted in evidence as **Exhibit P4**. The same revealed that one Abdallah Ally Ngurungu sold **11 acres** situate at Mapinga Village Bagamoyo District Cost Region to the Plaintiff for the tune of **Tshs. 4,400,000/=**. The same was witnessed and attested by Justine H. Julian (Advocate).

In the strength of the content of **Exhibit P4**, I am satisfied that the Plaintiff is the lawful owner of **11 acres** situate at Mapinga Village, Bagamoyo District Coast Region. The question raised b Defendant's Counsel in the Written Submission that the Sale is void since the Plaintiff has not complied with the requirement of **Section 8 (5) of the Village Land Act No. 5 of 1999**, the matter has been misconceived since the same does not prescribed the purported procedure propounded by Mr. Stanford learned Counsel. For ease of reference and clarity the provision provides:-

"A Village Council shall not allocate land or grant a customary right of occupancy without a prior approval of the Village Assembly."

The above provision speaks for itself that the Village Council cannot allocate village land or grant a customary right of occupancy without a prior approval of the Village Assembly. In the instant matter the Plaintiff bought the suit land via **Exhibit P4** from one Abdallah Ally Ngurungu and therefore there is no any facts adduced in respect to the transaction involving the Village Council to allocate land or grant Right of Occupancy neither to the Plaintiff nor to Abdullah Ally Ngurungu. The fact before the court of Law was on the disposition of the Land between the Plaintiff and Abdallah Ally Ngurungu, in their personal capacity.

In view of what I have narrated herein above, I am completely satisfied that **the Plaintiff is lawful owner of 11 acres situate at Mapinga Village Bagamoyo District Land Coast Region.**

The **2nd issue** is whether the Defendant trespassed the land in dispute. It should be borne in mind that since the first issue has been answered positively in favour of Plaintiff but only to the land dispute described as 11 acres situate at Mapinga Village Bagamoyo District Coastal Region, therefore the issue of trespass here is on respect of the said 11 acres.

To start with, I feel duty bound to celebrate the meaning of the phrase "**trespass**" as propounded by my learned brother Lugakingira, J. in the case of **FRANK SAFARA MCHUNA VS.**

SHAIBU ALLY SHEMDOLWA, HIGH COURT OF TANZANIA

TLR 1998 No. 279. The same has been defined as follows:-

"Intrusion upon land in the possession of another and the Defendant did intrude upon the land of the Plaintiff who under common law was in possession of the land. At common law there is a presumption that possession is always attendant to title and as the Plaintiff had title to the land it is presumed that he was in possession."

His Lordship was not far behind to define again the term "trespasser" where he said:-

"The Defendant moved into the land and started development thereon after the accrual of the right of the Plaintiff over the land."

However, in the case of **ELLIS VS. LOFTUS IRON CO. (1874) LR 10 CP**, the concept of trespass had been prescribed in the following manner:

"If the Defendant place a part of his foot on the Plaintiff's land unlawfully it is in law as much as trespass as if he had walked half a mile on it."

In the instant matter, the Plaintiff is asserting that 11 acres are belonged to them via **Exhibit P4** while the Defendants are also alleging the same that they are Lawful owner of 11 acres, but unfortunately DW1, DW2 AND DW3 did not produce any cogent evidence proving that they are lawful owners of 11 acres situate at Mapinga Village Bagamoyo District Coastal Region.

Now in the circumstances and available cogent and credible evidence adduced during the trial and admitted in court who has a better title of ownership of 11 acres and who is a trespasser; the answer is very straight that since the 1st issue has been answered affirmatively that the Plaintiff is the lawful owner of 11 acres situated at Mapinga Village Bagamoyo District Coastal Region as per Exhibit P4, I proceed to find therefore the Defendants have trespassed the Land in dispute i.e 11 acres owned by the Plaintiff. The acts of Defendants moved into 11 acres owned by Plaintiff and started developments thereon after the accrual of the right of the Plaintiff over the 11 acres situated at Mapinga Village Bagamoyo District, Coastal Region disclosed in law that they are trespassers since they have intrude upon land in the possession of the Plaintiff. At this juncture, I find that the Defendants have trespassed the land in dispute i.e in **11 acres** situated at Mapinga Village Bagamoyo District, Coastal Region.

As regards to the Farm No. 756 with 65 acres, since the same has been declared to be under ownership of the Registered Trustees of Kawe Development Trust as per Exhibit P2, the issue of the Defendants declaration that they are trespassers to the same, cannot arise; due to the reason that, the said lawful owner is not the one who prosecuted this case neither adduced any evidence (stranger to the case) subtitling the issue of trespassing over the said land. By the same reason, the said lawful owner can neither be granted any compensation and reliefs in respect of that piece of land.

On the 3rd issue is whether the Plaintiff is entitled to any compensation and to what extent.

In this case the Plaintiff is seeking for the tune of Tshs. 10,000,000/= as monetary compensation. It is trite law that trespass is actionable perse without proof of actual loss. The Plaintiff is entitled in law to general damages even of a nominal kinds for having been deprived the use of his land. I am mindful that the Plaintiff is also entitled in law to special damages to the extent proven in evidence. It follows therefore that the Plaintiff is entitled for compensation to general damages only since the Plaintiff has not seek special damages which required to be proved.

To what extent of the compensation is, I find the court will add the same in the spirit of the principle governing general damages which is of course the discretion of the court.

Finally but not least, what reliefs are the parties entitled. The contents of this judgment are sufficient testimony to that the Plaintiff deserves and is hereby granted the following reliefs.

- i. The Plaintiff is declared as lawful owners of 11 acres of the unsurveyed piece of land situated at Mapinga Village Bagamoyo District Coast Region.*
- ii. The Defendants, their agents or any other person claiming under them to be the owners and occupies of 11 acres of the unsurveyed piece of land situated at Mapinga Village Bagamoyo are restraining from approaching, developing entering, or laying their hands in any manner in stated land in dispute;*
- iii. The Defendants shall jointly and severally pay the Plaintiff 8,500,000/= as monetary compensation due to denying Plaintiff the right to use 11 acres of unsurveyed piece of land situated at Mapinga Village Bagamoyo.*
- iv. The Defendants shall jointly and severally pay costs of this suit*

But in all fours, the Defendants deserves nothing among the relief sought in the amended Written Statement of Defence. Since they are trespassers nothing qualified them. I proceed to find that since they have developed piece of land within 11 acres of unsurveyed land situated at Mapinga they are not entitled for compensation and the only relief to them is to demolish their buildings and carry away their building materials. See the case of

SALUM JUMA MZERU VS. OMARY UBAYA HCT Civil Appeal No. 6 of 1984 TLR NO. 31.

In the upshot, and based on what I have endeavored to state herein above, I am satisfied that the Plaintiff has successfully prove the case to the standard required in civil litigation in respect of 11 acres of unsurveyed land situated at Mapinga Village Bagamoyo District Coastal Region.

It is so ordered.

Right of Appeal Explained.



L. E. MGONYA

JUDGE

11/5/2018

COURT: Judgment delivered in the presence of Advocate Thadeo
for the Plaintiff and Ms. Emmy B/C in my chamber today
11th May, 2018.



L. E. MGONYA

JUDGE

11/5/2018