

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 50 OF 2019**

**SAID HUSSEIN MMBAGA.....1<sup>ST</sup> PLAINTIFF**

**SALIM HUSSEIN MMBAGA.....2<sup>ND</sup> PLAINTIFF**

**JUMA HUSSEIN MMBAGA.....3<sup>RD</sup> PLAINTIFF**

**RAMADHANI HUSSEIN MMBAGA.....4<sup>TH</sup> PLAINTIFF**

**ABRAHAM HUSSEIN MMBAGA.....5<sup>TH</sup> PLAINTIFF**

**HUSSEIN JUMA SALIM MMBAGA.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

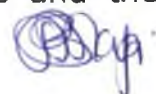
**MWAJUMA SALEHE CHUMA.....DEFENDANT**

**JUDGEMENT**

**MKAPA, J**

The Plaintiffs herein preferred this suit against the defendant for a declaration that; they are the lawful owners of Farms Nos. 3891 to 3896 situated at Bwama Village, Kibuta Ward, Kisarawe District, Coast region (the suit land); an order for a permanent injunction against the defendant and her successors in title from claiming any right in the said suit land; payment of costs of the suit.

The case for the plaintiffs is that, they lawfully own the suit land which they acquired vide purchase agreements entered on 17<sup>th</sup> December 2005 and 12<sup>th</sup> February 2006 respectively, between the plaintiffs and the



families of Mkangazi, Kusila, Ally Mazanda and Said Gongolo, hereinafter referred to as the previous owners. That, they purchased the suit land at a consideration of Six Million, Six Hundred Thousand shillings (Tshs. 6,600,000/=). The transaction was blessed and authorized by local authorities. In 2011 the plaintiffs surveyed the suit land at the cost of shillings Four Million Eight Hundred Thousand Shillings (Tshs. 4,800,000/=).

The cause of action arose in 2011 when the defendant alledged to be a daughter from the Mkangazi family encroached over the suit land claiming not to have been paid a share of the sale proceeds from the sale of her family's portion of the land. The plaintiffs decided to prefer this suit against the defendant.

The defendant filed a written statement of defence (WSD) denying all allegation by the plaintiffs. Under paragraphs 5 and 7 of the WSD the defendant stated that as a neighbour she was not involved in the survey of the suit land to enable her identify and protect her boundaries nor did she witnessed the sale transaction. The defendant also denied the allegation that she was the daughter of the Mkangazi family, and stated that she originated from the Chuma's lineage and Chuma's family had never disposed of their land to the plaintiffs. She further stated that she reported the matter to the Ward tribunal of Kibuta and the plaintiffs did not show cause.

At the commencement of the trial, Dr. Mutabaazi Julius Lugaziya, learned advocate appeared for and represented the plaintiffs, while the defendant, an elderly woman aged 80 years was unrepresented and fended for herself. Three issues were framed; that, who is the lawful



owner of the suit land; what is the measurement of the suit land and what are the relief(s) entitled to parties.

The plaintiffs summoned three witnesses named, Said Hussein Mmbaga (PW1), Mjanaheri Saidi Pembe (PW2) and Salim Salim Mmbaga (PW3). They also tendered 2 Exhibits. On the other hand the defendant summoned two witnesses and did not tender any Exhibit. At the end of the evidence parties opted to file final submissions.

The witnesses for the plaintiffs generally maintained the fact that they are entitled to ownership of the suit land as they lawfully acquired the same through sale agreement with the vendor and the same was approved by the local authority namely, the Village Council through the Village Assembly.

PW1 testified that, he is the owner of a piece of land at Kibongo, Bwama village, Kibuta Ward in Kisarawe District which he acquired through his late father Hussein Mmbaga who also acquired the same from local families (previous owners) in 2005. PW1 further testified that, he was aware that his late father Hussein Mmbaga, purchased the suit land from the families of Said Gongolo, Ally Mazawa Kusila, and Mkangazi but the defendant's family was not among them. PW1 stated that, his late father Hussein Mmbaga died in 2014 after he had purchased the suit land.

To support his claim, PW1 tendered "Hati ya Awali ya Mauzo ya Shamba" (sale agreement) dated 17<sup>th</sup> December 2005 and Minutes of Bwama Village Assembly dated 16<sup>th</sup> May, 2009 respectively, and the same were admitted collectively as Exhibit P1. He stated that, both in the sale agreement and in the minutes of the village assembly meeting in which the plaintiffs were recognized and registered as villagers there is no mention of the defendant's name as she did not attend. That, members



of the meeting include villagers and their leaders. It was PW1's testimony that following the village authority's approval, a survey by the Kisarawe District Land Office was conducted, and a survey plan No. 58857 dated 28<sup>th</sup> July 2009 with subdivision of six farms Nos. 3891-3896 was tendered and admitted as Exhibit P2. That, following the survey, beacons were placed and no one had objected. PW1 further testified that, it was until 2011 or 2012 when the dispute arose after the defendant encroached over the suit land claiming that she was yet to be compensated the two (2) acres; and that she did not sanction the sale of the suit land. PW1 stated that, he was informed by his late father that he had paid one Mzee Jongo thirty thousand shillings (30,000/=) as compensation for the two acres that the defendant was claiming. However, he acknowledged the fact that Mzee Jongo was the uncle to the defendant. He finally prayed for a declaration that the plaintiffs are the lawful owners of the suit land and payment of costs of this suit.

PW2's testimony corroborated the evidence adduced by PW1 and further testified that, being a resident of Bwama village he happened to know the late Hussein Mmbaga and defendant's father named Salehe Chuma also deceased. That, Salehe Chuma once lived in Bwama village but later he went to settle at Mengwa village where he died and laid to rest. It was his further testimony that, the late Hussein Mmbaga visited their village with the aim of acquiring 50 acres of farm land from local villagers and managed to purchase land from Mkangazi's family. That, the defendant and his father Salehe Chuma were not present when the sale transaction was effected only Mkangazi family were present. That, the defendant had earlier requested for a piece of land from Mkangazi's family for cultivation.



PW2 testified further that, Mzee Jongo asked for compensation for the two acres, however he did not witness him being compensated. That, a Village assembly meeting was convened where villagers attended as members including their leaders and deliberated on the sale transaction which later the meeting approved the sale transaction between the Mkangazi family and the late Hussein Mmbaga. However, the defendant claimed to be compensated for the two acres and that the late Hussein Mmbaga had informed PW2 that indeed the defendant needed to be compensated cash equivalent of two acres or allocated 2 acres in lieu but he had no proof whether she was compensated or not.

While cross examined by the defendant, PW2 stated that the Mkangazi family was responsible for the sale of the suit land to the plaintiffs and none of the relatives of defendant had complained as the defendant was not residing in the village.

It was PW3's testimony that, he is the son of the late Hussein Mmbaga who acquired the suit land from Mkangazi family and approved by the village authorities at a village assembly meeting at Bwama village. He stated that he became aware of the suit land as he used to accompany his late father to the suit land while bargaining for the purchase price. PW3 identified the signatures of Said Kusila, Ally Mazii, Mkangazi family and his late father in Exhibit P1. PW3 stated when his late father passed away and the defendant claimed to be compensated, PW3 made follow up to ensure that she was compensated for the two acres she was claiming. Later the defendant brought additional claims that she claimed compensation for five instead of two acres. He also identified Exhibit P2 (survey plan for the land in dispute) and recognized it. PW3 further





testified that, for the past three years (3) no relatives of the defendant ever objected to the transaction.

Defendants' evidence generally denied the claim that the suit land belongs to the plaintiffs. DW1 vehemently disputed the plaintiffs' claim that she was a daughter of Mkangazi's family and that she was denied a share of sale proceeds from the Mkangazis' family. According to her, she is a heir of Chuma alienage who had never disposed of even an inch of their land. She further testified that, she is a resident of Kibong'o Hamlet, Bwama village where she was born and raised. That, during the villagization programme she had to move with his late father, Salehe Chuma, and re-settle to Mengwa village where she got married. She stated that, she had to re-settle because it was a Government policy for people to re-settle to designated areas. It was her further testimony that, some of her family members and relatives including her uncle, and young sisters died and were laid to rest at Kibongo in their family owned farmland. She further testified that, her late father had a polygamous marriage consisting of three wives. That, DW1 being the first born to the deceased's 3<sup>rd</sup> wife upon the death of her father, and later of her husband she had to re-settle back to Bwama village and inherited the family land situated within the suit land and that the suit land measured approximately thirty (30) acres. She further testified that, when she went back and re-settled at the suit land, she found the family land intact covered with bushes. That, she is not aware of the sale transaction between the plaintiffs and the family of Mkangazi. She was residing at Mengwa and some of his brothers continued to stay at Bwama village until their death and during their stay they never had informed her of any sale transaction of the suit land.



DW1 informed the Court further that, she once filed complaint at the Ward Tribunal and the Tribunal decided in her favour and ordered DW1 be compensated fifty thousand shillings but she declined because she knew the suit land belonged to her.

The evidence of DW2, Mohamed Athuman Kocha was to the effect that, He was born at Bwama village in 1955 and raised in the same village. He stated that the land in dispute used to be a family land. The late Salehe Chuma (defendant's father) used to live at Kifuru, now Kibongo Ward, with Mkangazi family. Mkangazi family had invited him to their land. That, during the sale transaction Salehe Chuma was deceased and his children were not present. Since the sale transaction was a big event, that's why the defendant had to return to the family land at Bwama village. DW2 identified Exhibit P1 as sale agreement between Hussein Mmbaga and Mkangazi family. He further testified that the land in dispute which the defendant claimed to belong to his family is situated within the Mkangazi's family. That the defendant was not compensated. The plaintiffs surveyed the suit land first and revealed that it was measured 171 acres. Later, Mkangazi family did their independent survey and discovered that it was measured 216.4 acres, which resulted into a dispute at the Ward Tribunal in which the Mkangazi family claimed the plaintiffs to have tempered with the exact measurement of the land in dispute. However, the defendant was not part of the said dispute.

Further, it was his testimony that, he happened to know one Mr. Jongo who is defendant's uncle who was entrusted with the family land which was in possession of the defendant. He stated that Mr. Jongo was compensated for the two acres but DW2 did not recall the amount involved. DW2 testified further that, he doesn't know whether the money



was later handed over to the defendant because Mzee Jongo was not entrusted by the family to receive compensation. It was his further testimony that, the defendant is the rightful owner of the disputed land though he conceded not to be aware of the exact measurement of the same.

Having analysed the evidence obtained from the witnesses and exhibits tendered, in resolving the issues framed, from the very outset the law is settled that whoever alleges must prove.

Section 110 of the Evidence Act Cap 6 [R.E 2019] reads;

- (i) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.
- (ii) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

The Court of Appeal of Tanzania in **ABDUL-KARIM HAJI Vs RAYMOND NCHIMBI ALOIS & ANOTHER, (CIVIL APPEAL NO. 99 OF 2004 [2006] TZCA 22, (17 NOVEMBER 2006)** propounded this principle and emphatically observed;

*"It is an elementary principle that he who alleges is the one responsible to prove his allegation"*

In commentaries by **Sarkar's Laws of Evidence** 18<sup>th</sup> Edn., **MC. Sarkar, S.C Sarkar** and **P.C Sarkar**, published by Lexis Nexis, it was observed at page 1896 as follows;

***"..... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies***





***it; for negative is usually incapable of proof.***

*It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .....Until such burden is discharged the other party is not required to be called upon to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the otherParty.....***"

Turning to the issue as to who is the lawful owner of the suit land, the plaintiffs claimed under paragraphs 3 and 4 of the plaint the fact that, they are the lawful owners of all that piece of land designated as Farms Nos. 3891- 3896 situated at Bwama village, Kibuta Ward, Kisarawe District Coast Region (the suit land). That, they acquired the same through sale agreement entered between the plaintiffs' father (Hussein Mmbaga) and the family of Mkangazi on 17<sup>th</sup> November, 2005 and 12<sup>th</sup> February 2006 respectively, and later authorized and approved by the village assembly evidenced by minutes of a meeting held on 16/05/2009. (Exhibit P1 collectively.) The plaintiffs' further claimed under paragraph 6 of the plaint that after the sale transaction the defendant, a daughter from the Mkangazi family encroached over the suit land alleging that she had not been paid her share from the sale proceeds of her family's portion of land hence entitled to a compensation of two acres from the land in dispute or its cash equivalent.

From the very outset it is undisputed the fact that the land in dispute is a village land situated at Bwama Village, Kibuta Ward, Kisarawe District in



Coast Region. Undoubtedly, its management, including disposal is governed by the provisions of the Village Act Cap 114 [R.E. 2019]. Section 8 thereof, such management is the responsibility of the Village Council. As regards the allocation of village land, the relevant provision is sub-section 5 which makes it mandatory for the same to be approved by the Village Assembly as hereunder;

*"5 A Village Council shall not allocate land or grant a customary right of occupancy without prior approval of the village assembly "*

Now the question to be asked is whether the land in dispute was allocated to the applicants in compliance with the law and procedure governing the allocation of village land.

The plaintiffs claimed the sale transaction of the suit land between the plaintiffs and Mkangazi family and subsequent allocation of the same to the plaintiff's father was approved by the village assembly for Bwama village as per the minutes of the meeting held on 16/05/2009 (Exhibit P1 collectively). The same was corroborated by PW1 PW2 and PW3.

However, a thorough perusal of the said minutes has revealed the following under agenda item number one of the meeting namely **"Opening of the Meeting"** which reads;

*".....Mwenyekiti alianza kwa kusema kwa mara nyingine tupo hapa toka saa 4 asubuhi tukisubiri mpaka saa 8 alasiri hii wananchi mliohudhuria ni wachache. **Katiba hairuhusu kuendesha mkutano huu** kwa Hiyo ndugu wananchi naomba maoni yenu*



*na wananchi waliofika walitoa maoni yao kwa kusema  
mkutano uendeleo **kwani mara mbili umeahirishwa**  
kutokana na idadi ndogo ya wananchi tunaohudhuria.  
Hivyo baada ya Mwenyekiti kupata ridhaa ya wananchi  
alifungua mkutano huo saa 8.20 .....*

It is plain clear from the foregoing excerpt that, despite having realized the fact that as per their village assembly's constitution the meeting which later approved the sale transaction and subsequent allocation of the village land, lacked a requisite quorum. The chairman of the meeting who also is the village chairman for Bwama Village for reasons best known to himself proceeded to chair and deliberate on the agenda of the meeting after he had received advise from members present.

It is worth noting at this juncture the rationale behind the requirement under sub section 5 (*supra*) is to ensure participatory approach by villagers in matters of public interest including village land allocation in order to avoid endless land disputes which are rampant in our country. In this regard the chairman of the meeting who also happened to be a village chairman ought to have ensured such allocation complies with the requirements of the law, and procedures that govern the allocation of the village land. By convening a meeting and deliberating on the agenda knowingly the same lacked quorum thus unconstitutional as per the village assembly's constitution not only prejudiced the other villagers who were absent but also perpetrated land disputes like the one at hand. The reason I hold so is because the defendant is among those who did not attend the meeting as testified by PW1, where she could air her views. More so, the minutes of the meeting of village assembly is silent on those present, which suggest that the meeting was attended by the Village Chairman



and Village Executive Officer (VEO) only as evidenced in the last page of the minutes.

Section 8 (5) of the Village Land Act is read together with section 147 (1) of the Local Government (District Authorities) Act Cap 287 (R.E 2002) which empowers the village council to manage the affairs and business of a village. The section reads;

*"A village council is the organ in which is vested with all executive power in respect of all the affairs and business of the village"*

Guided by the above provision of the law the allocation of village land without approval of the village council is *Null and Void*".

The Court of Appeal was also confronted with a similar dispute in the case of **Bakari Mhando Swanya V. Mzee Mohamed Shelukindo and 3 Others Civil Appeal No. 389 of 2019 CAT** at Tanga (Unreported) in which the Court made the following observation;

*"Even if we assume that the purported sale agreement was valid which is not the case, then the same was supposed to be approved by the Village Council"*

As I mentioned earlier, in the instant suit the Chairman conceded to the fact that the village council meeting which was to deliberate and ultimately allocate the land in dispute was unconstitutional thus undoubtedly null and void. Hence the plaintiffs cannot claim to be lawful owners of the suit land.

On the other hand DW1 testified to the effect that, she originated from the Chuma family and traced her family history on how she migrated from Bwama village to Mengwa village during the time of villagization

programme and resettled back to Mengwa after the death of his father and later that of her husband. These facts were corroborated by DW2. It was her further testimony that, some of her relatives were buried at Bwama village and she managed to trace her family land when she resettled and found the area intact with bushes. She further testified the fact that, the land in dispute measured around 30 acres inclusive of the two acres which she has since claimed to be compensated but in vain. The issue of two acres compensation was corroborated by PW3 and DW1. Thus, by weighing the weightier evidence I am persuaded that, the defendant managed by balance of probability to prove ownership of her family land within the suit land to wit; the 2 acres of which PW1 and PW3 testified that she was not compensated in terms of money or piece of land See; **Geita Gold Mining Ltd V. Ignas Athanas** Civil Appeal No. 227 of 2017, **Antony M. Masanga Vs. Penina (Mamaa Mgesi) and Lucia (Mama Anna)** Civil Appeal No 118 of 2014 (both unreported). In these cases the defendant evidence appears weightier to that of the plaintiffs The Court of Appeal of Tanzania in **Paulina Samson Ndawavya V. Theresia Thomas Madaha CAT, Civil Appeal No.45 of 2017** (Mwanza- unreported) observed the following on how to discharge a burden of proof in civil case;

*".....That degree is well settled. It must carry reasonable degree of probability, but not so high as required in criminal case. If the evidence is such that the tribunal can say – **We think is it more** probable than not, the burden is discharged"*





Guided by the above legal authority, my view is, given the enumerated set of events by DW1's testimony it is more probable than not, that she is the lawful owner of the 2 acres from the suit land.

From the foregoing, analysis this brings me to the conclusion as far as the first issue is concerned that, the plaintiffs have failed to prove ownership of the suit land due to non-compliance with the laws and procedures governing allocation of village land, which resulted into the allocation being null and void.

The second issue as to the size of the suit land the same need not detain me much having established the procedure for allocation of the suit land which is a village land is null and void.

As to the issue of relief, the plaintiffs are not entitled to any relief as they are encroachers.

Consequently, the suit is dismissed with costs.

Taking note of what I have explained above, defendant shall continue to enjoy peaceful possession of the two acres from the suit land.

It is so ordered

Dated and Delivered at Dar-Es-Salaam, this 21<sup>st</sup> day of September 2021.



  
**S.B MKAPA**  
**JUDGE**  
**21/9/2021**