**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF MWANZA)**

**AT MWANZA**

**LAND CASE NO. 44 OF 2017**

**SIMON WANZARA ..... 1ST PLAINTIFF**

**WAMBURA MAHENDE ..... 2ND PLAINTIFF**

**MANZESE NKUNZU .....3RD PLAINTIFF**

**JOVIN KILANGI ..... 4TH PLAINTIFF**

**DAUDI PETER ..... 5TH PLAINTIFF**

**CHARLES NYAKULIMBA ..... 6TH PLAINTIFF**

**MAHMOUD JUMA ..... 7TH PLAINTIFF**

**BELTA PAUL ..... 8TH PLAINTIFF**

**AGNES TUMAINI ..... 9TH PLAINTIFF**

**NEEMA ELISHA ..... 10TH PLAINTIFF**

**JACKSON N. CHARLES ..... 11TH PLAINTIFF**

**RAHEL ABEL ..... 12TH PLAINTIFF**

**ZEDEKIA SIMON ..... 13TH PLAINTIFF**

**DANIEL LUGATA ..... 14TH PLAINTIFF**

**NICODEMU MKONO ..... 15TH PLAINTIFF**

**PERUS KILEMEJI ..... 16TH PLAINTIFF**

**CHARLES NYAMHANGA ..... 17TH PLAINTIFF**

**CHRISTINA CHACHA ..... 18TH PLAINTIFF**

**DINA SOMA SAMANY ..... 19TH PLAINTIFF**

**ESTA SAID MATWI ..... 20TH PLAINTIFF**

**ATANAS KAFIFI ..... 21ST PLAINTIFF**

**GIDFREY SIMON ..... 22ND PLAINTIFF**

**PRAXEDA KAKUNGURU ..... 23RD PLAINTIFF**

**HUSINA SALUM ..... 24TH PLAINTIFF**

**KITWIMA DANIEL ..... 25TH PLAINTIFF**

**NELIA KALOKOLA ..... 26TH PLAINTIFF**

**EMMANUEL LUVINGA, NORMA SOKANYA ..... 27TH PLAINTIFF**

**MOHAMED KYARUZI ..... 28TH PLAINTIFF**

**JACKSON CHARLES ..... 29TH PLAINTIFF**

**MARIA FUNGAMEZA ..... 30TH PLAINTIFF**

**SELEMANI NASOR MASOUD ..... 31ST PLAINTIFF**

**VERSUS**

**ILEMELA MUNICIPAL COUNCIL ..... DEFENDANT**

# JUDGMENT

8th September, & 4th November, 2020

**ISMAIL, J.**

This suit touches on the ownership of a parcel of land located at Bwiru area within Ilemela Municipality, in Mwanza City. The parcel of land is popularly known and shall hence forth, be referred to in this decision, as Bwiru Elimu. The suit land is embroiled in an ownership tussle between the plaintiffs, who allege that they are the lawful owners thereof, by virtual of acquisition from previous owners, and the defendant who alleges that these claimants were mere imposters who derive no interest in the suit land. The contention by the defendant is that true owners of the suit land were allocated surveyed pieces of land and were contented by the decision.

The dispute arose when the management of Bwiru Girls and Bwiru Boys secondary school, both under the ownership of the defendant, alleged that their land had been encroached by the plaintiffs. The plaintiffs denied that they had encroached or trespassed onto the land that belongs to the schools. This tussle lasted for years until September, 2015, when intervention of the Minister for Lands was enlisted, culminating in a resolution which saw the schools cede some of their land, to be surveyed

and parceled into residential plots which would be allocated to genuine occupiers of the said land, prior to the emergence of the dispute. The Minister further directed that a Committee be formed to work hand in glove with the defendant in identifying the genuine holders of the land, and ensuring that the minister's directive is implemented in an orderly manner. Going by the defendant's contention, the Minister directed that each of the genuine and verified claimants be allocated one surveyed plot of land. While some of the residents were allocated pieces of land, the plaintiffs allege that they were short changed as the said allocation eluded them, on what the defendant alleged to be inability to verify them as owners of the surveyed land from which the allocation was made. This triggered the plaintiffs' disgruntlement, hence their decision to institute the instant matter.

By a suit instituted in this Court on 14th July, 2017, the plaintiffs, in their joint and several capacities, moved the Court to grant the following reliefs:

*(i)* *A declaration that the plaintiffs are true owners of the suit property located at Bwiru-Mwanza City;*

*(ii)* *The defendant be ordered to allocate the plaintiffs the suit property; and*

*(iii)* *Costs be paid by the defendant.*

These reliefs arise from what the plaintiffs contend to be an act of reneging on the undertaking made by the defendant in the implementation of the Minister's directive. In the written statement of defence filed in Court on 22nd September, 2017, the defendant vehemently denied that it reneged on the undertaking. It contended that allocation of the suit plots was subject to passing a verification process that would ascertain if the intended allocatees were lawful indigenous holders of title to the said land. The defendant averred that the number of verified holders plummeted to 135 after a thorough verification. The defendant held the view that the suit is misconceived, deserving nothing but a dismissal with costs.

At the commencement of the proceedings four issues were drawn to guide the conduct of the proceedings. These were:

1. *Whether the plaintiffs are lawful owners of parcels of land at Bwiru Elimu area within Ilemela Municipal Council;*
2. *If issue one is in the affirmative, whether the defendant deprived the plaintiffs of their respective pieces of land;*
3. *Whether the plaintiffs are entitled to be allocated surveyed plots by the defendant;*
4. *To what reliefs are the parties entitled.*

At the closure of the plaintiffs' case, the learned counsel for the plaintiffs informed the Court that the list of the plaintiffs had been whittled down to twelve, following the decision by other plaintiffs to pull out of the proceedings on the ground that ownership of some of them had been verified and had, in turn, been allocated their pieces of land.

Disposal of this matter will follow the sequence of the issues framed at the commencement of the proceedings.

In the first issue, the Court is called upon to pronounce itself as to whether the suit land at Bwiru Elimu belongs to the plaintiffs. The view held by the plaintiffs is that they have been able to conform to the requirements of sections 110 and 111 of the Law of Evidence, Cap. 6 R.E. 2019 which cast the burden on the plaintiffs to prove the allegation that they are the rightful owners of the suit land. The contention is that the testimony of PW7, the local council leader; PW 8, the Chairperson of the Committee, and PW10, the Committee's secretary, as corroborated by exhibit PE-1 and 2, has done enough to prove the plaintiffs' ownership of the suit land.

As summarized by the counsel for the plaintiffs, a total of 12 witnesses testified in support of the plaintiffs' case, and each of the witnesses staked their claims on the suit land. The unanimous contention

by all of the plaintiffs is that they were all owners of tracks of land that they acquired either through purchases done by them or that the same were bequeathed by their parents and held them under customary titles. This testimony was fortified by the documentary evidence which was mainly the newspaper cuttings in which matters relating to the dispute and resolution mechanisms were widely covered. The plaintiffs contended further that the defence testimony as given by the defence witnesses, especially DW1, talked about documentary pieces of evidence which were not tendered in court. These included invoices, town planning drawings, exchequer receipts and similar other documents. The contention by the plaintiffs' counsel is that failure to tender the said documents rendered the oral testimony inadmissible as the defendant was possessed of documentary evidence which it did not adduce in court. The learned counsel bolstered his arguments by citing the decision of the Court of Appeal in ***Daneil Apael Urio v. Exim Bank (T) Limited***, CAT-Civil Appeal No. 185 of 2019 (unreported), which discussed the import of section 61 of Cap. 6 to the effect that oral evidence cannot be used to prove the contents of a document. The contention by the plaintiffs is that absence of the documentary evidence rendered the oral evidence,

especially that of DW1 worthless and incapable of proving the case for the defendant.

Besides the oral account of all the witnesses who testified for the plaintiffs, reliance was placed on the news headlines which quoted the Minister for Lands as saying that names of the entitled occupiers should not come from the defendant. In its steady identification of the owners, the defendant was directed to involve the local leaders of the area. It is the plaintiffs' contention that the statements made, assuring the public that allocation would be done to all the rightful owners ought to have been put into action, consistent with the provisions of section 113 of Cap. 6 which states as follows:

> *"When one person has, by his declaration act or omission intentionally caused or permitted another person to believe thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative shall be allowed, in any suit or proceedings between himself and that person or his representative do deny the truth of that thing."*

Based on all this, the plaintiffs held the view that the suit land belongs to them and that they should be allocated land based on the number of plots each one of them got from the survey.

The defendant has punched holes on the contention made by the plaintiffs, arguing that none of the plaintiffs had done any developments or was living in the pieces of land that they allegedly possessed. The defendant's counsel laughed off at the choreographed pattern of having the plaintiffs asserting ownership through sale or grant as a gift by previous owners, all of whom were deceased. The defendant contended that none of the plaintiffs except one (PW12) produced a documentary evidence to prove that acquisition of the pieces of land was through disposition by way of sale or love and affection. The defendant argued that in view of the fact that the plaintiffs allegedly acquired the said pieces of land decades after the said lands had been allocated to Bwiru schools in 1918 and 1980, then the defendant held the first equity that should prevail over the others. To bolster this argument, its counsel made reference to this Court's decision in ***Mercy Said Mwilima v. Safimba Enterprises Limited & Others***, HC-Land Case No. 360 of 2016 (unreported).

Submitting on the status of the previous owners, the defendant contends that, the plaintiffs who are bound to prove their case and discharge the burden bestowed on them by sections 110 and 111 of Cap. 6, failed to prove that at the time of their acquisition of the disputed land the previous owners had good title capable of being transferred to the

plaintiffs. The defendant's contention is that no testimony was led to substantiate that. The defendant held the view that the plaintiffs did not have a good title, while the defendant's title spans from as far back as 1918. In yet another contention, the defendant held the view that none of the plaintiffs or their alleged transferors of the disputed land put up any unexhausted improvements. PW11's testimony was singled out to cement the contention. The defendant further submitted the land was not put to any use, including agricultural activities.

The defendant argued that the plaintiffs cannot contend that they held the disputed land under customary tenure as they neither resided in the disputed land, nor did they clear the suit land to demonstrate that they are owners. In the absence of any of that, the defendant urged the Court to invoke the holding in ***Anthony Mseke & 15 Others v. The Chief Executive National Environment Management Council & Another***, HC-Land Case No. 151 of 2012 (unreported).

Submitting on the ownership, the defendant contended that for a dispute that has existed for more than 40 years, failure to call witnesses to testify on the plaintiffs' ownership means that their claim should not be given any credence. The defendant alleged that failure by the plaintiffs to offer themselves for physical inspection means that they had no piece of

land on which to stand and be verified, and this was a proof that they were not part of the Bwiru Elimu dispute.

The defendant raised an argument that having failed to adduce any testimony that they were the owners of the disputed land, the plaintiffs had failed to prove any claim of right in the suit land, or that they had a better title than that of the defendant.

Concluding the submission on the first issue, the defendant contended that even the 12th plaintiff who tendered the sale agreement to prove ownership, did not lead in any corroborative evidence in that respect.

As rightly stated by both counsel, a party that alleges existence of a certain fact bears the evidential burden of proving such existence. This is the import of sections 110, 112 and 115 of Cap. 6, and it has been emphasized in numerous court decisions and various commentaries by renowned legal scholars. Like in all cases of a civil nature, and consistent with section 110 of Cap 6, such burden is borne by the plaintiffs and the standard set is that of balance of probabilities. The position in our legal regime traces its roots from the Indian Evidence Act, 1872, which was in force prior to promulgation of Cap. 6, vide GN. No. 225 of 1967. Significantly, the scope of applicability of the Indian statute, especially on

burden of proof, has been the subjected to extensive discussions through commentaries published by various authors of high repute. These include the legendary commentaries made by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis,* at page 1896. The relevant part of the commentaries was quoted with approval by the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (Mwanza-unreported). It states 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 other party..."*** [Emphasis added].

The learned authors' views were given a further impetus in ***Paulina Samson Ndawavya*** (supra) through the superior Court's citation of

***Pensions*** [1937] 2 All E. 372, from which the following passage was quoted:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."*

As correctly prefaced by the both counsel and, as gathered from the testimony of the disputants, the dispute in respect of what came to be known as "*Bwiru Elimu dispute*" has raged on for several decades, and it took the political intervention to break the ice and to come to some kind of truce that subsequently paved the way for resolution. This can be gathered from Exhibit P2, which provided the methodology that the disputants ought to have followed in resolving the matter. This included composition of a

Committee that would oversee implementation of the resolutions made, and survey of the land with a view to making demarcations and creating plots which would be allocated to claimants. This fact is also gathered from the demand letter, dated 29th May, 2017, served on the defendant (part of Exhibit P1). In the said letter, the plaintiffs' advocates quoted the Honourable Minister for Lands stating as follows:

> *".... Hapa tunatatua mgogoro wa watu waliokuwepo na shule .... Viwanja vitapimwa .... halafu baada ya hapo ninyi wananchi ndio mnaojua nani na nani wanastahili kuwa hapa. Mtaelekeza wataalam wa Halmashauri kwamba kwa majina haya, hawa ndio wamilikishwe viwanja hivi na wapewe hati. Majina hayatatoka Halmashauri. Majina lazima yatoke kwenu ili asije mtu yeyote au Mfanyabiashara huko mjini akawaonga (sic) watu wa halmashauri akanunua viwanja hapa. Jambo hili lifanyike likiwa shirikishi na kamati ya wananchi ... Hayo majina watapewa hivyo viwanja, watalipia kodi zote kama wengine, na kila mtu apate hati .... Eneo la shule lipeimwe na lipewe hati na kuzungushwa fensi kwa kodi ya viwanja vya wananchi."*

From the totality of the testimony adduced, what comes out clearly is that the Minister's directive set out terms and condition for allocation of the land to the claimants and that these terms were to be conformed to. The condition precedent for such allocation was proof of ownership. The

question to be resolved is: Was this done? In terms of PW11, such verification was to be done through the people's Committee, but he, like all other plaintiffs –except PW12 - did not testify to the effect that they participated in any verification, through people's Committee or any other way. PW12 testified that he was involved in the verification but he admitted that, neither his name nor that of his father (the alleged previous occupier) feature in Exhibit P1. The importance of verification has been highlighted by the defence witnesses. DW1 has testified that the Minister's instruction was that verification was to be done for all the residents who were earmarked for allocation and that the verification process was inclusive and transparent, adding that all those who were involved in it were allocated plots. Identification of the plots and owners was done by the local leadership, and that this process continued until 2019. This position has been corroborated by DW2, Mtonja Mabu Katigula, DW3, Winfrida Mabu Katigula, DW4, Mawazo Andrea; and, most importantly, DW5, Mosses Samamba, who was involved in all Committees which were formed to resolve the dispute. He testified that the first verification was done through the Committee. These witnesses and the rest of the defence witnesses testified that they were verified through physical presence at the suit plots and that they were all given invoices through which payments

were processed and executed, after which the allocation was done. Some of these witnesses were involved in the instant proceedings but they pulled out of the case. They were able to be verified and allocated land. Since the plaintiffs were unable to verify their ownership, the plausible conclusion is that they failed the test.

As gathered from the testimony, the plaintiffs' ownership of the disputed land was either through a direct purchase from the previous owners or through a bequest from their parents or kins. However, in a fashion that strikes resemblance, no documentary evidence (except Exhibit P3 tendered by PW 12) such as sale agreements, deeds of gift for love and affection, or a semblance of any of it was produced to support the contention that titles to the said land passed on to them. None of the persons who are said to have sold or offered the said plots were called to testify that titles indeed passed to the plaintiffs. PW12 who alleged that he was given the land by his father, admitted that his father was alive but he felt no need of having him have his day in court to testify.

In some cases, some of the plaintiffs, such as the 30th plaintiff, Maria Fungameza, masqueraded as descendants of certain clans. This was refuted by DW2 and DW3 who are from that clan.

DW5 has testified in great detail that the plaintiffs who claim ownership of the plots at Bwiru Elimu were not the residents of the area and owned no plot of land in Bwiru Elimu. He stated that they came into the picture because the disputes were consolidated to cover Medical Research area, Jiwe Kuu and Farms where these others came from. He eloquently testified that the resolution brokered by the Minister involved those who owned land in Bwiru Elimu and that none of the plaintiffs had a stake in this dispute. What is also clear is that the plaintiffs still have a chance of having their ownership verified and have titles granted to them if they pass the test, and it comes out that institution of court proceedings before they got through the verification process was a needless indulgence that is intended to avoid the due process which authenticate their claims.

In the totality of all this, I entertain no doubt in my mind that the plaintiffs endeavours have not met the threshold of proof of their allegations as set out in sections 110, 111, 112 and 115 of Cap 6, and as emphasized in numerous cases some of which are cited above. I hold that the plaintiffs have failed to discharge the evidential burden of proving they were the lawful owners of the land in dispute. Such failure necessitates the application of the holding in ***Hemed Said*** (supra) cited by the counsel for the Plaintiffs, to the effect that ***"the person whose evidence is heavier***

***than that of the other is the one who must win."*** The first issue is, therefore, answered in the negative.

The 2nd and 3rd issues require me to state if the plaintiffs' rights were deprived by the defendant, and whether they (the plaintiffs) are entitled to an allocation of the surveyed pieces of land. Whereas the plaintiffs contend that they are entitled to be allocated pieces of the surveyed land, the defendant holds the view that, having failed to prove that they are not trespassers, their claim for allocation is unjustified. The plaintiffs base their contention on the directive given by the Minister that all the occupiers who were hitherto perceived as trespassers should stay on. The plaintiffs have also given an account of why they think they are entitled to the said allocation. On the other hand, the defendant's counsel premises his contention on the decision by 19 of the erstwhile plaintiffs to drop from the case, contending that fraud which was allegedly perpetrated by the plaintiffs could not let the remaining plaintiffs off the hook. The defendant's other contention is that none of the plaintiffs went through the verification process.

I take the view that resolution of these issues is consequential and are dependent on the holding in the first issue. As held earlier on, the plaintiffs' right of ownership solely hinges on their ability to prove

ownership of the pieces of land which were subjected to survey and parcelation. This could be decisively done by participating in the verification process which was a condition precedent for the allocation. The available evidence has shown that none of them participated in the verification. They rushed to this Court as the verification process, which would put them in a pole position for allocation, was on going. Having spurned that glorious chance which would assert their claims, it cannot be said that they were deprived of their rights. I also take into account the testimony of DW1 and all other defence witnesses who were unanimous that the allocation was, up until 2019, open to those who were willing to comply with the allocation procedures, including verification of their titles. In view of this, it cannot be said that there was a deprivation of the plaintiffs' right to allocation of the pieces of land. I am of the considered view that the 2nd issue is resolved in the negative. Applying the same reasoning, I take the view that resolution of the 3rd issue is dependent on the plaintiffs' ability to demonstrate their interest in the disputed land. This is done by complying with conditions which govern allocation of the said land, key among them being their ability to prove that they are the owners of the suit plots. Inevitably, this would entail going through the 'ritual' of physical verification. Upon

satisfaction by the defendant, the said allocation will be done. Having failed to go through the said "ritual" the plaintiffs' interests were not assented.

In the upshot of the foregoing, it is my considered view that the plaintiffs' claims have not been proved to warrant the granting of the prayers sought. Accordingly, the suit is dismissed in its entirety, with costs.

It is ordered accordingly.

Right of appeal is duly explained to the parties.

DATED at **MWANZA** this 4th day of November, 2020.

***M.K. ISMAIL***

***JUDGE***