

TANZANIA / JUDGMENT

MOHAMED GAU BORA Edited 2222

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI LAND CASE NO. 4392 OF 2024 MOHAMED GAU
GORA..... 1st APPELLANT PIRI NAHHATO
JALLA..... 2ND APPELLANT SALIMU NINGA
POSSA..... 3rd APPELLANT KASSIMU GAU
SAIDI.....4thAPPELLANT HAMISSI GESSO
SALANGUTI..... 5thAPPELLANT BURA HAPI
BUSO..... 6thAPPELLANT KAWIA CHARLES
GAU.....7thAPPELLANT KAWIA CHARLES
GAU..... 8thAPPELLANT VERSUS HANANG' DISTRICT
COUNCIL..... 1stDEFENDANT QALOSENDO VILLAGE
COUNCIL.....2ndDEFENDANT ATTORNEY
GENERAL.....3rdDEFENDANT

JUDGMENT

12th November 2024 & 5th February, 2025 Kahyoza, J.: Mohamed Gau Gora, Piri Nahhato Kijalla, Salim Ninga Possa, Karimu Gau Saidi, Hamisi Geso Selanguti, Bura Hapi Busso, Bura Soya Lacha and Kawia Charles Gau (the Plaintiffs) alleged that Qalosendo village Council evicted them from their lawful land (suit land) and set ablaze their houses together with other properties on fire. The plaintiffs sued Hanang District Council, Qalosendo village Council and 1 the Attorney General (the Defendants) claiming for a declaration that they are lawful owner of the suit properties, an order that the action and omission of the defendants leading to setting ablaze the plaintiffs' properties were illegal, an order that the defendants are trespasser to the suit land. In the alternative, the plaintiffs prayed this Court to order the defendants to follow mandatory procedure to acquire the disputed land. They also claimed general damages as this Court may reasonably asses and costs of the suit. The defendants refuted the allegation that the plaintiffs are lawful owners of the suit land and denied to have set the plaintiffs' houses and other personal belongings on fire. The Plaintiffs alleged that they acquired the lands in dispute by clearing the virgin land, which is 223 acres situated at Qalosendo village. They occupied the land in dispute in 1990's and used it for pasturing and farming uninterrupted over long time. On 3rd December, 2022, the plaintiffs received personal calls from the chairperson and the village executive officer calling them to attend the meeting. They attended the meeting where they were ordered to

vacate the suit land. The plaintiffs demanded to be compensated before they vacated. The village leaders promised to convene another meeting with leaders from different institutions to initiate the acquisition procedure. 2 On 5th November, 2022 at around 05:00hrs, the village chairperson with a group of people invaded the suit land, pulled down the plaintiff's houses and set the house and other properties on fire. The plaintiffs complained to the Ward Executive Officer and later to the District Commissioner. On 04.04.2023, Qalosendo village authority convened a meeting to discuss how to compensate the plaintiffs. The defendants refuted the plaintiffs' allegation that they are lawful owners of the suit land. They contended that before Qalosendo village was registered in 2004, it was one of the hamlets of Dirma village, which was registered in 1978. They added that in 1990, Dirma Village Assembly passed the village Land Use Plan reserving the disputed land as a community forest. They added that the plaintiffs are trespassers. Qalosendo village council admitted to direct the plaintiffs to vacate the suit land but refuted the allegations of setting set ablaze the plaintiffs' house and other properties. The second defendant averred in the WSD that it removed 31 trespassers out of the suit land and others were ordered to pay fines for conducting, farming and grazing livestock without permission inside the disputed land. From the above rival allegations, the court framed two issues as follows: 3

1. Whether plaintiffs are lawful owner of the suit land; and
2. To what reliefs are the parties entitled to. All plaintiffs except Mohamed Gau Gora (the first Plaintiff) testified. Mohamed Gau Gora did not testify on the ground that he was dumb but not deaf as he could hear upon using very high volume. He had a person holding the powers of attorney, Joseph Msewa (Pw8). Joseph Msewa (Pw8) testified on behalf of the first plaintiff and summoned Hussein Abdi (Pw9). The rest of the plaintiffs and their witnesses who were Martin Shauri (Pw10), Elias Hussein (Pw11), Adam Athuman (Pw12) Idd Salimu (Pw13), Adam Yahaya (Pw14) Hamis Ally (Pw15) and Juma Abdi (Pw16) deposed that on 5.12.2022 at dawn the chairperson and a group of people pulled down the plaintiffs' houses and set them ablaze together with other plaintiffs' properties. The defendants' witnesses, Asteria Michael Mwati (Dw1), the chancellor of Gilman (Dilma) ward, and Jumanne Kihungo Soghwenda (Dw2), the ward executive officer of Gilman ward, refuted the allegations that the plaintiffs' houses and other personal properties were set on fire. Jumanne K. Soghwenda (Dw2) also denied the allegation that Mohamed Gau Gora complained to him in writing. 4 The defendants' last witness, Karimu Hassan Msangi, the land surveyor of Hanang' District, did not testify regarding the issue of setting ablaze the plaintiffs' properties. Was the plaintiffs' houses and properties set on fire? Having heard the evidences on both side, I find that the plaintiffs proved by balance of probabilities that second defendant's chairman leading a group of people destroyed the plaintiffs' house by fire and set ablaze their properties. The defendant's attempt to challenge the plaintiffs' evidence did not pass the test. It is trite law that the burden of proof in Civil case is not static, it shifts from the plaintiff to defendant after the plaintiff has discharged his duty. The Court of Appeal in Yusufu Selemani Kimaro v. Administrator General and 2 Others, Civil Appeal No. 226/ 2020, took a stand that once the plaintiff gave evidence the defendant bears a burden to controvert the plaintiff's evidence. However, the burden does not shift from the plaintiff to the defendant to refute or counter

the plaintiffs evidence, unless the plaintiff's evidence established the prima facie case. The Court of Appeal in Yusufu Selemani Kimaro (supra) stated- "... Going by the above exposition of the law, it would be insincere if not a misapprehension of the law on the part of Mr, Halfani to complain as he did that the trial Judge had shifted the onus of proof 5 onto the second respondent. For, in civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary. This is so because as per the case of Raghramma

- v. Chenchamma, A 1964 SC 136, such a shifting of onus is a continuous process in the evaluation of evidence." The weakness of the defendant's evidence does not lessen the plaintiff's burden of proof. That is, the plaintiff must discharge his burden of proof notwithstanding the defendant's evidential weight. The Court of Appeal, in Paulina Ndawavya v. Theresia Thomas Madaha, Civil Appeal No. 53/2017 (TCA unreported) held that- "the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and the burden of proof is not diluted on account of the weakness of the opposite party's case." (emphasis is mine) Given the above principles, after the plaintiffs proved that the chairperson and his team set, their houses and other person belongings on fire, on the balance of probabilities, the burden of proof shifted to the defendants to disprove that. The defendants neglected to summon the village chairperson who is alleged to set the plaintiffs' houses on fire or any other village leader at that time. The village chairperson, at the date of the 6 commission of the alleged act, was a key witness. Failure to call a key witness, the village chairperson, testify on a material aspect of this case entitles this Court to draw an adverse inference, against the defendants. I draw an adverse inference that if the village chairperson was summoned, he would have testified against the defendants that he was directed to forcefully evict the plaintiffs and set their houses and other person effects on fire. Further to the above, it is not in dispute that the defendants evicted the plaintiffs. It was alleged under paragraph 5 of the Written Statement of Defence (WSD) that- "776 Defendants complaint, the second defendant managed to remove 31 trespasses out of the disputed land and others were penalized to pay fines for conducting farming and keeping livestock without permission inside the disputed land". The defendants did not summon any witness from Qalosenda village, the second defendant, to testify how they removed 31 trespassers from the suit land. The second defendant's chairperson or the village executive officer were key witnesses to testify how the removed trespassers from the suit land, in the absence of such evidence, the plaintiffs' testimony that the chairperson and his group evicted the plaintiffs and set ablaze their houses and properties remains unchallenged. 7 Worse still, there are contradictions between the defendants' written statement of defence and Jumanne K. Sogwenda (Dw2)'s evidence. As the Court of Appeal of Tanzania held in Makori J.B. Wassaaa and Joshua Mwaikambo & another [1987] TLR 88- "In general, and this is I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and in evidence he is not permitted to set up a new case" It was pleaded in the WSD that the second defendant managed to remove

the plaintiffs from the suit land while Jumanne K. Saghwenda (Dw2) deposed that the plaintiffs vacated the disputed land voluntarily. Since parties are bound by their pleadings and they can succeed by establishing what they pleaded in their pleadings and not otherwise, Jumanne K. Saghwenda (Dw2)'s evidence, which contradicted the written statement of defence, is valueless. As a result, I find as pleaded that the second defendant removed the plaintiffs from the suit land, thus, the plaintiffs did not vacate voluntarily. In the end, I find that the defendants did forcefully and without notice evict the plaintiffs and set ablaze their houses and other properties. Are the plaintiffs lawful owners of the suit land? 8 The plaintiffs' contention is that they acquired the suit land in 1990's by tilling the virgin land. There is no doubt that tilling a virgin land is one of the ways of acquiring land. Piri Nahhato Kijalla (Pw1), deposed that he occupied his land in 1994 when he tilled a virgin land. He also deposed that he inherited the land from his father. During cross-examination, he disputed to have inherited the disputed land from his father, hence, he gave contradictory evidence. Bura Hapi Basso (Pw2) deposed that he cleared the virgin land in 1990 and occupied it. Kassim Gau Said (Pw3) did testify on how he obtained the disputed land but he explained how it was set on fire. Hamisi Salanga (Pw4) like other plaintiffs deposed that he cleared a virgin land in 1995. As to the first plaintiff who did not testify, the evidence was that Joseph Msewa and the first defendant occupied the virgin land in

1990. Joseph Msewa's evidence was supported by Hussein Abdi's testimony that he visited Mohamed Gau Gora in 1990 and found him clearing the virgin land. There was also evidence that some of the plaintiffs inherited the disputed land from their father. Salim Ninga Possa (Pw5) and Kania Charles Gau (Pw7) deposed that they inherited it from their father. Bura Sayo Lacha (Pw6) deposed that he was born at that place in 1992. 9 The defence's evidence was that the suit land was formerly part of Dirma village and in 1990 it was declared a community forest reserve. Asteria Michael (Dw2) added that after Qalosendo village was registered in 2004, the forest was allocated to Qalosendo village. She strongly testified that at that time there were no trespassers in the forest reserve. She contended that people invaded the suit land in 2022. It was the defence evidence that in 2009 the forest land was surveyed. It was called Gidamulo village forest reserve. He tendered the map as exhibit D.1. As shown above, the plaintiffs' evidence is that some acquired the disputed land by tilling the virgin land and some inherited the disputed land from their fathers. Piri Nahhato Kijalla (Pw1) deposed that he tilled the virgin land and inherited it from his father. He is not quite sure how he acquires the land. The plaintiffs did not contradict the defence evidence that Qalosendo village was part of Dirma Village until 2004 when it was registered. It was deposed that Dirma village was registered in 1978. Thus, at the time the plaintiffs occupied the suit in 1990's the disputed land was part of Dirma village as it was registered in 1978. The defence contended that the plaintiffs invaded the suit land in 2022 and that when Qalosendo village was registered in 2004, there were no trespassers occupying the suit land. I wish to state that whether the plaintiffs occupied the suit land in 1990's as they deposed, or in 2022 as the defence witnesses testified, it is undisputed that, they occupied the land within the registered village. It is settled that once

the village is registered, the management of the village land becomes the function of the village council. I wish to refer to National Agricultural and Food Corporation V Mulbadaw Village Council and Others [1985] TLR 88 and G.N. 168/75, para 5(2) provides as follows- "(2) subject to availability of arable land, the Village Council shall allot a piece of farmland to every kaya in the village according to need and ability to develop it. The Village Council shall have power to determine the structural pattern of farms in the village and the use thereof " There is yet another proof that once the village is registered the management of the land vested in the village council. This position is found in the determination of the Court of Appeal in the case Metthuselah Paul Nyagwaswa vs Christopher Mbote Nyirabu [1985] TLR 103. The Court found that there was no transferred because the village council did not approve it. It stated- "rights to land held in a registered village could only be transferred with the approval of the Village Council... the sale to the appellant, for lack of approval, was void and of no effect." ii Arguing by analogy, if the Court of Appeal held that there was no lawful transfer of land in the registered village in the absence village council's approval, I do not hesitate to hold that there would be not lawful occupation of the land without the blessings of the village council in the registered village. That is the position before the Village Land Act, [Cap. 114] came into operation. After the Village Land Act, came into operation in 2004, it is beyond dispute that no person would legally occupy or acquire land without the involvement of the village council. See section 8 of the Village Land Act, which provides that- "S. -(1) The village council shall, subject to the provisions of this Act, be responsible for the management of all village land." There is no doubt that the plaintiffs occupied the disputed land without the involvement of the village council. Thus, they did not lawfully occupy the disputed land. Whether before or after the operation of the Village Land Act [Cap. 114 R.E. 2019], the plaintiffs could lawfully acquire land in the registered village after involving the village council. I find that the plaintiffs did not establish that they are lawful owners of the suit land. To what reliefs are the parties entitled to? 12 I have found that the plaintiffs did not establish to be lawful owners of the suit land. For that reason, they cannot be declared owners of the suit land. A person who has no title or did not established his title, that person is a trespasser. A trespasser has no right to benefit from his own wrongful act of trespass. For that reason, a trespasser cannot be compensated for forceful eviction. The Court of Appeal in Pricess Nadia (1998) Ltd vs Remency Shikusiry Tarimo & Others (Civil Appeal No.242 of 2018)

[2021] TZCA 249 (9 June 2021) held that- "Lastly, we once again agree with the learned advocate for the respondents that since it was proved that the appellant was a trespasser, she had no right to benefit from her wrongful act. At worst, the appellant assumed the risk arising from her unlawful occupation in the premises. Just as she was not entitled to any notice before eviction, she had no right to claim any compensation from the forceful eviction." (Emphasis supplied) The above notwithstanding, I did not find it lawful for the second defendant while evicting the plaintiffs set ablaze the plaintiffs' houses and other personal properties. The second defendant was unreasonable and misused her right to evict the plaintiffs who had trespassed to the suit land. Setting on fire the plaintiffs

properties, was not an avoidable act or consequential act of evicting trespasser. It would have been a different 13 scenario, if in the course of evicting the plaintiffs, the second defendant damaged by breaking or the plaintiffs' properties got stolen, the plaintiffs would have no right to pray for compensation. The second defendant's act of setting on fire the plaintiffs' properties was a maliciously act, calculated to harm the plaintiffs. The plaintiffs are entitled to be compensated. However, I examined the evidence on record and found that there is no material for this case to base on to assess the general damages. It is settled that general damages are not required to be proved but the plaintiff must adduce evidence for the court to assess and justify the award of the general damages. The Court of Appeal in Anthony Ngoo & Another vs Kitinda Kimaro (Civil Appeal No. 25 of 2014) [2015] TZCA 269 (25 February 2015) had the following to comment on award of general damages- "The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason, which was not done in this case." In the end, I find the plaintiffs failed to establish their title to suit land and that although they were entitled to compensation for second defendant's malicious act of setting their properties on fire, they did not adduced evidence for this Court to base its award. Consequently, I dismiss the suit 14 entirely for want of merit. Since the second defendant maliciously set the plaintiffs' properties on fire, I refrain to award costs to the defendants. I order accordingly. Dated at Babati this 5th day of February, 2025. John R. Kahyoza, JUDGE Court: Judgment delivered in the presence of second to eight defendants, the first plaintiff is represented by Mr. Joseph Mseswa and Mr Lameck Buntuntu Senior State Attorney, Ms. Naombi Paul, State attorney, and Mr. Santunini Simon Lawei for Defendants. Mr Shedrack (RMA), the bench clerk, present. John R. Kahyoza, J. 5.2.2025 15

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