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

**[IN THE DISTRICT REGISTRY]**

**AT ARUSHA**

**LAND CASE NO. 34 OF 2016**

**COL. JOHN MONGI.....PLAINTIFF**

**VERSUS**

**YOHANA LESTIYA.....1ST DEFENDANT**

**STEPHANO YOHANA.....2ND DEFENDANT**

**SAIMONI YOHANA.....3RD DEFENDANT**

**NOEL YOHANA.....4TH DEFENDANT**

**KIBORI LENDILILA.....5TH DEFENDANT**

**MANINGO LAIBONI MUNGA.....6TH DEFENDANT**

**JOSHUA MILIA MOINE.....7TH DEFENDANT**

**EDWARD SAIBOKU.....8TH DEFENDANT**

**JOHN SAIBOKU.....9TH DEFENDANT**

**SHIWAKA LENGOYO.....10TH DEFENDANT**

**JUDGMENT**

***Date17/02/2020 & 30/03/2020***

**MZUNA, J.:**

**COL. JOHN MONGI** (plaintiff) claims against the defendants jointly and severally for ownership of a parcel of land measuring 342 acres located at Samaria Village Arumeru District within Arusha Region which he says he purchased from one Ndewirwa Nassari on 17th June 1986 for Tshs

2,740,000/- (exhibit P1). It was trespassed into on 10th February 2011 by six defendants then followed by other defendants in 2015.

There was a time when he instituted a land matter No. 1/2011 at Maroroni Ward Tribunal which proceeded ex parte in his favour but was then ordered by the Arusha District Land Tribunal to start afresh vides Appeal No. 78 of 2011. The same fate faced criminal case No. 881 of 2011 of Maji ya Chai Primary court at Arumeru District which was nullified in favour of Yohana Lesitiya; Mbuki Lendalela and Stephano Yohana who appealed at the District court vides Criminal Appeal No. 16 of 2012.

This matter was instituted after direction by the District Land and Housing Tribunal that it should be instituted in the appropriate court. It is evident that the claim by the plaintiff is from the sale agreement whereas the defendants says inherited it and others say were allocated by the Village leaders. Stephano Yohana for instance tendered even the customary village title (exhibit D1). It is worth noting that the 7th and 9th defendants passed away. The administrator of the 9th defendant was appointed unlike that of the 7th defendant despite being given time to do so.

During the hearing Mr. Modest Akida, learned counsel, appeared for the plaintiff whereas the 1st, 5th 8th and 9th defendants were represented by Mr. Samson Rumende, also learned counsel. Then Ms. Marcelina Bandiye the learned counsel advocated for the 1st 2nd and 5th defendants. The other defendants appeared themselves unrepresented. The case proceeded ex parte against the 6th, 7th and 10th defendants who were dully served but failed for unknown reasons to appear before the court. The plaintiff brought

six (6) witnesses in court to prove his claim against the defendants whereas a total of eight witnesses testified for defence case.

Three issues were framed, namely:- Whether the plaintiff is the rightful owner of the suit land? Whether the plaintiff has suffered any damages? AND, what reliefs are the parties entitled to.

There are other matters which should not detain me and therefore I have to deal with them out rightly. The defence raised an issue that the suit land has not been properly identified by the plaintiff in terms of size, location and boundaries. I would say issue of location under paragraph 2 of the Written Statement of defence was not disputed and therefore cannot be raised during submissions or defence hearing. It is a long established principle of law that parties are bound by what they plead in their pleadings as it was so held in the case of **James Funke Ngwagio v. Attorney General** [2004] TLR 161 in which the Court of Appeal held that:-

> *"The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise."*

On account of the above holding, I find as not controverted that the suit land is located at Samaria Village as well pleaded by the plaintiff in the plaint.

I revert to the first issue. The question to ask is, who as between the plaintiff and defendants, is the lawful owner of the suit plot?

According to the available evidence, the plaintiff claims against the defendants to be the lawful owner of a parcel of land measuring 342 acres

situated at Samaria Village within Arumeru District in Arusha Region. He says, purchased the suit land from one Ndewirwa Nassari on 17th June 1986. Two witnesses namely; Massawe s/o Melemboki (PW4) and Moses s/o Mafunga Sikawa (PW5) testified that they were both present and witnessed the sale agreement. The plaintiff tendered exhibit P.1 the sale agreement. It is the testimony of the plaintiff (PW1) that on 10/02/2011 six trespassers trespassed the land and started farming.

The exact number of acres trespassed into is shown at paragraph 9 of the plaint that:- 1st defendant 80 acres; 2nd defendant 30 acres; 3rd defendant 15 acres; 4th defendant 15 acres; 5th defendant 60 acres; 6th defendant 26 acres; 7th defendant 30 acres; 8th defendant 50 acres; 9th defendant 30 acres; and 10th defendant 6 acres."

The evidence for the defence is that the 1st 2nd 3rd and 4th defendants who are father and sons respectively, do not stay at Samaria Village nor do they own land at that particular village. According to their testimony, which is available on the record, the 1st defendant (DW1) owns a shamba at Majengo Village which he inherited from his late father, while the 2nd defendant (DW2) owns a plot of land allocated to him by the Village Council of Majengo Village now known as Kaloleni Village at Majengo Ward. Whereas the 3rd (DW3) and 4th (DW4) defendants claimed that they stay at the DW1's plot since he has never allocated any plot of land to them as his children. DW7 Martha w/o John Mollel who is the wife of the late John Saiboku said that she was married since 1988. She found her husband at the plot of his father. She was surprised to hear that they trespassed the plaintiff's plot. The testimony of Joseph s/o Nditoiya (DW8) who is the Village Chairman of Kaloleni Village

formerly Majengo Village reveals that the defendants have never trespassed the suit land. He even claimed that he has known the plaintiff in court during the hearing.

I have also carefully considered the contents of exhibit P-1 wherein it is written that the suit land borders the 1st defendant in the western side. This fact was vehemently disputed by the 1st defendant who denied being neither the witness to the sale nor a resident of Samaria Village.

The law as it stands, any sale for a Village land there must be a sanction of the Village council; see the case of **Metthuselah Paul Nyagwaswa vs Christopher Mbote Nyirabu** [1985] TLR 103 (CAT) at page 112. The court was interpreting Directions issued under G.N. 168 of 1975 especially direction 5 (6) which reads:-

*5. (6) Except with the approval of the village council no person shall -*

*(a) transfer to any other person his right to the use of land in a village;*

*(b) dispose of his house, whether by sale or otherwise.*

The court held that:-

***"I am of the view that the sale by Patrick to the appellant of the land in Mbezi was void and ineffectual as it took place without the approval of the Village Council..."*** (Emphasis supplied)

The evidence of DW5 Kiboro Lendelela Mbauta was very articulate on this when he said that allocation must be by a document issued by Village Council apart from the sale agreement. The plaintiff relied on the evidence of PW2

Abiud Simon Mbise who was the Village Chairperson from 2010 to 2015. He tendered a certificate of Village land exhibit P7 which however did not show list of villagers owning land within the village. He even admitted never knew the disputed piece of land because at the time of sale he was a normal villager.

Again there is the evidence of PW3 Emmanuel Kishil Kaaya who said that he is the one who allocated land to the seller Mr. Ndewirwa Nassari, now deceased. By then PW3 was a councilor "Jumbe". He did so after being instructed by Mangi through the Messenger. He admitted however never knew its exact measurement and never knew its boundaries. This evidence is full of deficiencies because the alleged Mangi was not mentioned his/her name let alone the said messenger. More seriously, its size was not mentioned despite its vastness in size. This could have been solved by a written document which is missing.

One thing which is clear is that if PW3 says that the first defendant (DW1) Yohana Olestiya was the Member of the Village council whom the sale agreement purports was one of the witnesses for the purchaser, the plaintiff, but had denied to have been his witness or any knowledge of such sale agreement, then it means the plaintiff's evidence is shaking or not something to rely on. Exhibit P1 is wanting. The allegation that it ought to have been disproved by another document is unfounded. I disagree entirely with Mr. Akida, the learned counselwho argued that there is no oral as well as documentary evidence. I say so because the burden of proof rests on the plaintiff to disprove the actual possession by the defendants as correctly

submitted by Ms. Bandiye, learned counsel, citing section 119 of the Evidence Act, Cap 6 RE 2002. The said provision reads:-

> *"S. 119. When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who asserts that he is not the owner."*

Ms. Bandiye, learned counsel averred that the sale agreement (exhibit P-1) is not genuine. I find some force in her submissions for the following reasons:- First, the witness for the plaintiff Abiudi Simon Mbise (PW2) told the court that he is the Village Chairman. He admitted was not involved in the sale agreement. His testimony does not carry any credit since he testifies that the suit land belongs to the plaintiff but he has no any proof so far. He admitted that when someone purchase a village land they had to inform the Village authorities, he being the Village council member.

Likewise, Emmanuel Kishil Kaaya (PW3) told the court that he allocated the suit land to the plaintiff way back in 1963 but right now he cannot remember the size nor the boundaries. However, during cross examination he averred that he allocated the suit land to the plaintiff in 1963 (sometimes said in 1933).

Second even a witness to the sale for the purchaser, the plaintiff appearing as No. 1, denied to be a witness thereto (i.e DW1).

Thirdly, even if the witnesses appears as eight in total, including the seller and purchaser, however only five had their names with thumb prints while

other three had no thump prints including that of Rev. Daniel Mbise whom the plaintiff said is the one who linked him with the seller, being his uncle. The same defect appears for Limboke Massawe who appered as a witness for the seller. Only a thumb print appears without signature. Even one of the neighbours whom the sale agreement purports was a party to it as a witness for the purchaser Mr. Yohana Olesteiya bordering it at the Northern side, his name has no thumb print. There was no any plausible answer given for that very crucial defect. At one time Mr. Moses Mafunga Sikawa (PW5) said that:-

> ***"Yohana Lestiya did not put a thumb print because he said that Ndeiawirwa was his uncle. Rev. Daniel Mbise did not sign because he knew John Mongi."***

This evidence contradicts with that of PW4 who said that:-

> ***"Thumb print was for those who did not know to write. Those who could write signed."***

This is a total lie at a broad day light because reading exhibit P1 there are some who signed and at the same time there are finger prints!

The plaintiff never summoned even the alleged advocate one Y. M. Kinabo whose name appears in the official seal not even typed in the document contrary to known procedure. No doubt failure to call the material witness, the advocate an inference adverse to the plaintiff must be drawn for such failure.

The defence on the other hand by Joseph s/o Nditoiya (DW8) who is the Village Chairman of Kaloleni Village (formerly Majengo Village) reveals that

the defendants have never trespassed the suit land. He even claimed that he has known the plaintiff in court during the hearing. That evidence was also maintained by Yohana Lesitiya (DW1) who said never knew Ndewirwa Nasari; Timotheo Ndewirwa and Lemboki Massawe. As for the plaintiff, he knew him in 2011.

There was a time during site visit when PW6 Daniel Pallangyo said that there was a change of neighbouring parties to the suit plot from the time of sale to its current status. Though he was not a party to the sale, he said that John Iketi Kaaya was the Branch Chairman at Samaria Village during the time of sale despite being not a party thereto. He was a mere over seer for the plaintiff. No doubt the said John Iketi Kaaya never assumed his role at the time of such sale otherwise there ought to have been another document to that effect with official rubber stamp.

The plaintiff produced exhibit P-1 to trace his title to the suit land whereas 2nd defendant (testified as DW2) tendered exhibit D1 to show that has title in respect of the land located at Majengo Village. During hearing it emerged that the plaintiff failed to get title because there was a dispute on the proper boundaries. I would say that came about due to doubts on his ownership otherwise I find no force in such argument. On account of the above evidence issue of ownership must be resolved against the plaintiff.

This reminds me on the decision in the case of **Jela Kalinga v. Omari Karumwana** [1991] TLR 67 (CA) where the court held that:-

> *"...one of the defences against an action for trespass is a claim by the defendant that he had a right to the possession of the land*

*at the time of the alleged trespass or that he acted under the authority of some person having such a right."*

If the plaintiff says the suit plot is at Samaria while he had no Minutes of the Village council of Samaria granting him title then the one who are in occupation of the suit plots (the defendants herein) must have better title.

For the above stated reasons and my critical analysis of the evidence, the plaintiff has failed to prove that he is the lawful owner of the land in dispute, albeit on the balance of probabilities. The first issue is resolved in favour of the defendants.

I now turn to the second issue as to whether the plaintiff suffered damages. In the final submissions the counsel for the plaintiff argued that the court overlooked the issue of trespass when the issues were framed up. He invited the court to invoke its inherent powers to determine first whether there was trespass so that it can further determine on the issue of damages.

It is the submission of the plaintiff's counsel that the plaintiff could not achieve his business goals because the defendants troubled him by trespassing the suit land. He relied on the case of **Tanzania Saruji Corporation v. Africa Marble Company Limited** [2004] TLR 155 to buttress his point.

On the part of the defendants, they are of the view that even the amount of damages claimed in the plaint are envisaged in the business plan which was not yet executed. It is argued that this cannot be specific damages as claimed by the plaintiff.

She referred to a number of case laws to prove that the quantum of damages pleaded by the plaintiff is not justifiable in law. The case of **Tanzania-China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR 70 and **MS Fishcorp Limited v. Ilala Municipal Council,** Commercial Case No.16 of 2012, High Court Commercial Division at Dar es Salaam (unreported) were cited.

The claim for Tshs 100,000,000/= is stated under paragraph 4 of the plaint. The plaintiff tendered his business plan (exhibit P6) to prove how the said quantum would have been earned. He relied on loss of income which was anticipated in future business related to fish ponds, mango and citrus fruit trees and maize and beans farming projects. The case of **MS Fishcorp Limited** (supra) is more relevant to the case at hand because it dealt with damages arising from loss of business which is almost similar to the issue at hand. In that case the plaintiff claimed for damages at the tune of Tshs 400,000,000/= on account that he intended to install machines, freezing, storage and ice making facilities at the demised premises which allegedly would yield Tshs 80,000,000/=. During the trial the plaintiff failed to prove how the said amount would be earned. In declining the prayer the court stated at page 12 that:-

> *"It is trite law that loss of business falls with the realm of special damages which must be specifically pleaded and proved"*

The court went on to state further at page 13 that:-

*"...whether loss of business is pleaded as such or as loss of profit directly, evidence as to existence of such business prior to the loss and to what extent or in what quantity it existed is necessary."*

I fully associate myself with that decision of my brother Judge. I find, support as well in the case of **Masolele General Agencies v. Africa Inland Church Tanzania** [1994] TLR 192 which dealt with similar issue in which the appellant company claimed loss of business profit Tshs 1,660,000/= it would have realized from cement business. In refusing the prayer the Court of Appeal stated at page 194 that:-

*"No documents were produced to back up these figures which therefore appear to have been plucked from the air. For instance apart from the appellant's word, there was no evidence that it deals in cement."*

In our case, the plaintiff has failed to establish whether the defendants did occasion loss to him leading to the damages of Tshs 100,000,000/=. Secondly he relied on loss of income which was anticipated in future business related to fish ponds, mango and citrus fruit trees and maize and beans farming projects. In this respect he did not provide proof as to how the said income would have been earned or has ever dealt with such business before the alleged trespass. His evidence was that he harvested maize before such alleged trespass. No proof was tendered even for such harvest.

The cited case of **Tanzania Saruji Corporation** (supra) does not apply to this case. In that case there was exact proof of the amount of loss suffered

by the plaintiff. The court observed on the distinction between general and specific damages that:-

(i) *General damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of; the defendant's wrongdoing must, therefore have been a cause, if not the sole, or a particularly significant, cause of damage;*

(ii) *When the precise amount of a particular item has become clear before the trial, either because it has already occurred and so becomes crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage."*

Further as already alluded, the plaintiff cannot prove loss caused by the defendants by relying on exhibit P.6 because it was "*plucked from the air*" hence distinguishable. In the absence of proof for possession at the time of the alleged trespass, then even such claim would fail.

It is a trite law that he who alleges must prove. This is in view of section 110 (2) of the Evidence Act, Cap 6 RE 2002 which provides:-

> *"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 exist."*

This fundamental rule of evidence was echoed in the case of **Abdul-Karim Haji v. Raymond Nchimbi Aloyce & Another**, Civil Appeal No. 99 of 2003 (unreported) that:

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

That has never been proved by the plaintiff.

Lastly, on what reliefs are the parties entitled to. Having found that there is no proof for ownership by the plaintiff, no relief is awardable to him.

In conclusion therefore, I find that the plaintiff has failed to prove his case albeit on the balance of probabilities. The purported sale agreement is nothing but (I am sorry to say) a manufactured document and if not manufactured has no blessing of the Village Council which was so important as per the law given the fact that the claimed plot measures 342 acres with more than 400 inhabitants (according to the defence). The principle of **"Caveat emptor"** meaning "buyer beware" applies in this case. The claim for damages which had not been proved is equally dismissed. The defendants are declared lawful owners and therefore they should not be evicted.

The suit is hereby dismissed with costs. Judgment for the defendants.

HIGH COURT OF TANZANIA

**M. G. MZUNA,**

**JUDGE.**

**30/03/2020.**