IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

LAND CASE NO. 10 OF 2019

KLEMPU KINOKA LAIZER ..... PLAINTIFF

Versus

OLORUBARE NGINYU ..... DEFENDANT

JUDGMENT

3rd March & 7th May, 2021

Masara, J.

1.0 Introduction

The Plaintiff, **Kiempu Kinoka Laizer**, is suing **Mr. Olorubare Nginyu,** the Defendant, for trespassing into a piece of land measuring 1000 acres located at Longai/Soita area, Naberera Village, Simanjiro District within Manyara Region (the "suit land" or "farm"). In the Plaint, the Plaintiff prays for a declaration that the suit land measuring 1000 acres which in the North side borders Mama Shirima, on the South it borders a road, on the West it borders Mr. Kimaro, Mike and Ngala and on the East it borders a road and the Defendant, is the lawful property of the Plaintiff; an order for payment of Special Damages to the tune of TZS 520,000,000/= arising from loss occasioned by the Defendant's cattle, which entered in the suit land, ate beans and grass reserved for grazing the Plaintiff's cattle; an order of payment of TZS 220,000,000/= per year from the date of judgment to the date of vacant possession of the land in dispute; an order for general damages for trespass; an eviction order against the Defendant from the suit land; costs of the suit and any other reliefs this Court may deem fit and just to grant.

The Defendant denied all the claims against him stating that he does not own land at Naberera Village as contended. That he owns a piece of land measuring 50 acres that was allocated to him by Landanai Village in 2017 where he resides. According to the Defendant, the land was allocated to him for the purposes of establishing a cattle kraal and building a church. The Defendant also denied that his cattle entered the Plaintiff's land and caused the alleged loss.

At the hearing of the suit, the Plaintiff was represented by Mr. John Lundu assisted by Mr. Alpha Ng'ondya, learned advocates. The Defendant was represented by Mr. Moses Mahuna, learned advocate.

2.0 Factual background

Facts giving rise to the dispute in this case can be divided into two limbs. According to the Plaintiff, the suit land was originally the property of one Mohamed Aziz. In 2005, the said Mohamed Aziz was allocated the suit land by Naberera Village authorities for agricultural purposes, among others. That the suit land is located at Soita Hamlet, Naberera village. Mohamed Aziz continued occupying the suit land until 2012. Between 2007 and 2011, the Plaintiff used to lease 200 acres out of that land for agricultural purposes. In 2012, Mr. Aziz intimated his intention of selling his farm (the suit land). The Plaintiff showed interest of buying it. The two agreed on the terms which culminated into Mr. Aziz selling all the 1000 acres farm to the Plaintiff at a price of TZS 30,000,000/=. The sale price was paid in two instalments. Prior to buying it, the Plaintiff made an official search in the Village Office and was assured that the suit land was lawfully owned by Mr. Aziz. The Plaintiff then divided the farm into three parts

depending on the use. 540 acres were used for grazing cattle, 60 acres were used for boma (cattle kraal) and 400 acres were used for agricultural purposes. He continued using the farm without any dispute whatsoever.

In January 2017, the Plaintiff was remanded at Karanga Prison for an undisclosed offence. While in remand, he was informed by one Steven Kimani Laizer (PW4) that the Defendant had invaded the farm and put a cattle kraal therein. He was also informed that the Defendant would pay him a visit in the prison to discuss over the matter. On 5/3/2017, he was further informed that the Defendant's cattle entered his farm and destroyed 70 acres of beans as well as the grass reserved for fattening his cattle. The Defendant did not visit the Plaintiff as earlier intimated. The Plaintiff was released from remand prison on 25/7/2017. Following his release, the Plaintiff also witnessed the destruction that was caused by the Defendant's cattle and the cattle kraal built within his farm. A reconciliation meeting between the Plaintiff and the Defendant was convened by the elders but it was not successful. The Plaintiff stated that he used to earn about TZS 250,000,000/= annually from agriculture but he could not earn that since part of the farm is now in the hands of the Defendant and his relatives. In some years, he could not cultivate due to threats.

On the part of the Defendant, he informed the Court that he does not own a piece of land in Naberera Village. He was born and lives in Landanai Village. That in 2017 he applied for a piece of land for establishing a boma from Landanai Village and he was allocated 50 acres. That the land given to him was a bush land. He therefore cleared it and established his boma

there. He stated that his cattle never entered the Plaintiff's farm because had it been so they would be arrested and he would be called in the Village office. On a different dimension, the Defendant stated that in 2004 Mohamed Aziz trespassed their village at Ahomo Alaika but he was evicted. That he also heard that the Plaintiff has conflict with Landanai Village involving land at Ahomo Alaika but in 2020 the Village also evicted Klempu from that land and the area is now occupied by Landanai Village. Even at the area where the Plaintiff was evicted by the Village in 2020, the Defendant denied that he does not own land there. That the case was fabricated against him, even at his village there is Bi. Shamba known as Nganashe but she was not involved in assessing the damage. He questioned why the case was reported at Mererani Police station which is 104 kms away while there is a nearby police station.

3. 0 Issues

The following issues were framed for determination by the Court:

a) Who is the rightful owner of the suit property;
b) Whether the Defendant trespassed into the Plaintiff's land; and
c) To what reliefs are the parties entitled to.

In attempt to prove his case, the Plaintiff summoned five witnesses; namely, Klempu Kinoka Laizer (PW1), Peneti Mbototo (PW2), Sironet Landey (PW3), Steven Kimani Laizer (PW4) and Peter Losioki (PW5). Three exhibits were tendered; namely, Minutes of the Naberera Village Meeting allocating the suit land to Mohamed Aziz dated 10/3/2005 (Exhibit P1), report of the value of destruction caused in the Plaintiff's farm (Exhibit P2) and Sale Agreement between Mohamed Aziz and the Plaintiff dated 30/11/2012 (Exhibit P3).

On the other hand, the Defendant summoned four witnesses; namely, Lengenyu Yohana Yamati @Olorubare Siriani Yohana @Nginyu Yohana (DW1), Loipuke Oloishiro Njaraani (DW2), Jackob Saruni Lendee (DW3) and Haiyoo Yamat Mamasita (DW4). Four exhibits were tendered by the Defendant; namely a letter from Mererani Police Station addressed to Agricultural Officer dated 6/3/2017 (Exhibit D1), a letter from Manyara Regional Commissioner's Office dated 16/3/2020 (Exhibit D2), various letters (a letter from Simanjiro District Executive Director, two letters from the VEO Landanai to the Plaintiff and a letter form the Plaintiff to VEO Landanai) (Exhibit D3) and Minutes of Landanai Village Meeting dated 15/2/2017 (Exhibit D4).

3.1 Who is the rightful owner of the suit property?

The Plaintiff's case is that the suit land was allocated to Mohamed Aziz by Naberera Village through the Village Council meeting of 10/3/2005. This is revealed by Exhibit P1. This position was supported by the evidence of Peneti Mbototo (PW2) who was the Naberera Village Executive Officer in 2005. According to this witness, Mohamed Aziz arrived at their Village in 2005 whereby he applied for land for the purposes of agriculture and business. His application was discussed at the level of the Village Council. He was allocated 1000 acres at Longai area in Naberera Village. PW2 wrote to the District Executive Director informing him of the allocation. PW2 added that Mohamed Aziz used the land for over 10 years without any conflict. His evidence was also supported by the evidence of PW3 who was a member of Naberera Village Council at the time of allocation. PW3 stated that he participated in the deliberations that discussed and later

allocated the suit land to Mr. Aziz at Langai area in Naberera Village. PW3 is the one who showed Mr. Aziz the land.

The Plaintiff's version of events was, as already stated, contested by the Defendant. According to the Defendant, Mohamed Aziz trespassed into the Village land at Ahomo Alaika in 2004 but he was evicted. DW4 who was Naberera Ward Councillor between 2015 and 2020 testified that he knew Mohamed Aziz as he also served as Landanai Village Chairman between 2005 and 2015. He further stated that Mohamed Aziz invaded Landanai Village but he was evicted in 2004. That Mr. Aziz went back there in 2006, cleared the land and cultivated it. That in 2009 they evicted him again. This witness went on to state that in 2012 the Plaintiff invaded the same area they intended to evict him. He informed them that he bought the land from Mohamed Aziz.

From the above testimonies, it is imperative first to determine whether the said Mohamed Aziz was lawfully allocated the suit land as stated by the Plaintiff, PW2 and PW3. The Plaintiff tendered in evidence Exhibit P1, minutes of the Village Council, proving that the suit land was allocated to Mr. Mohamed Aziz. He also called two people who participated in the deliberation and allocation of the suit land to the said Mohamed Aziz. PW2 and PW3 appear in the list of attendees of the said meeting and PW2 signed as the Village Executive Officer. It is not clear whether the decision of the Village Council was later endorsed by the Village Assembly as required by law. Ordinarily, a village council is the overall caretaker of the Village land. This is in accordance with section 8(1) of the Village Land Act, Cap. 114 [R.E 2019]. The relevant provision provides:

"8.- (1) The village council shall, subject to the provisions of this Act, be responsible for the management of all village land."

But a Village Council should seek approval from a Village Assembly. This is provided under section 8(5) of the Village Land Act which states:

"8. – (5) A village council ***shall not allocate land or grant a customary right of occupancy without a prior approval of the village assembly."***

The requirement to involve the Village Assembly is sacrosanct. The Court of Appeal in the case of ***Udhagweha Bayai and 16 Others Vs. Halmashauri ya Kijiji Cha Vilima Vitatu and Another***, Civil Appeal No. 77 of 2012 (unreported) stated:

"In conclusion therefore, in the absence of any record of the meetings of 11/12/1999 and 14/12/1999 it will be fair to say that there is no material upon which we could safely say that the allocation of the land in question was made in compliance with the dictates of the law as stipulated above. In other words, ***there is nothing to show that the village council and village assembly were involved in allocating the land in issue ..."*** (emphasis added)

Considering that no dispute over the allocation of the land to Mr. Aziz was ever raised, it is believed that the allocation was done within the prescribed procedures of the law. As pointed out earlier, the Village Council Minutes tendered prove that the suit land was given to Mohamed Aziz. The minutes provide that the land had mistakenly been allocated by Orkesumet village but were indeed within the boundaries of Naberera Village. The allocation was subject to fulfilment of certain conditions. The third agenda at page 3 of exhibit P1 reads:

"Mashamba yaliyopo Longai.
Mjumbe alisema mashamba yaliyopo Longai yaliyotolewa na Kijiji cha Orkesumet yapo ndani ya mpaka wa Kijiji cha Naberera. Wakulima hao

walitaarifiwa kuwa wapo ndani ya Kijiji cha Naberera na walioambiwa walete maombi kijijini ili wajadiliwe. Ndugu Mohamed Aziz mkazi wa Moshi ambaye alileta ombl lake la heka 1000 kule Longai na alitoa ahadi ya kujenga Ofisi ya Kijiji atakubaliwa....

Ombi la Mohamed Azizi lilijadiliwa na kupewa shamba huko Longai lenye ukubwa wah eka 1000 tu."

There is no doubt that the land was given to Mr. Aziz as per the quoted paragraphs of the minutes. It was not contested that the said Mohamed Aziz took control of the said farm and used it for a considerable number of years before disposing it.

The next question to resolve is whether the Plaintiff legally bought the suit land from Mohamed Aziz. To prove the sale the Plaintiff tendered exhibit P3 titled *Makubaliano ya Kukamllisha Manunuzi ya Shamba.* He completed payments for the farm on 30th November, 2012. Exhibit P3 was notarised by an Advocate. The Plaintiff did not tender the first contract which he had attached to his Plaint. Furthermore, there is no evidence whether the Village Council was made aware about the transfer of land. That notwithstanding, there appear to have been acquiescence from the village government as no complaint was ever lodged against the Plaintiff. PW3 also testified that the farm originally allocated to Mohamed Aziz was bought by the Plaintiff. PW3's evidence was supported by the evidence of PW4 who was the Plaintiff's farm manager since 2007, when he started leasing the farm. There are no doubts therefore that the suit land originally given to Mohamed Aziz did change hands and was bought by the Plaintiff for TZS 30 million.

Furthermore, the fact that the suit land was legally bought from Mohamed Aziz is supported by the defence evidence. Exhibits D2, which is titled: ***"Mgogoro wa Mipaka ya Shamba la bwana Klempu Kinoka Laizer katika vijiji vya Landanai na Naberera Wilayani Simanjiro"*** appear to confirm that the suit land was not only originally allocated to Mohamed Aziz but that was bought and is owned by the Plaintiff. Exhibit D2 is a letter from the Regional Commissioner for Manyara Region addressed to the District Commissioner for Simanjiro. The only issue raised in the letter is whether the land is located at Naberera Village or Landanai Village. The letter advised that the Plaintiff authenticates his ownership of the suit land by making a fresh application to Naberera Village authorities.

I should point out that the issue before me has nothing to do with the boundary dispute that may be existing between the two villages. The dispute is on whether the portion of land occupied by the Defendant forms part of the 1000 acres owned by the Plaintiff. The Defendant does not seem to deny that fact. His only defence is that he was allocated the said 50 acres by Landanai village government in 2017. The Defendant relied on Exhibit D4 which is said to be minutes of the village Council of Landanai dated 15th February 2017. This exhibit was tendered by Lopuke Oloishiro Njaraani (DW2) who is the VEO of Landanai Village since 2020. The authenticity of the said minutes was challenged by the Advocate for the Plaintiff. One of the shortcomings of Exhibit D4 is whether the same relates to the suit land or another land. There was no evidence led to prove that Alaika hamlet and particularly Orkona and Ahoumu areas are one and the same with Longai area where the suit land is situated. Further, according to Exhibit D3, there was no previous allocation of the

suit land to anyone. According to DW2, the allocation of the said land was to commence in January 2021, long after this suit had commenced in Court. Having so observed, it is the holding of this Court that the suit land, measuring 1000 acres, is legally owned by the Plaintiff. The first issue is therefore resolved in favour of the Plaintiff.

3.2 Did the Defendant trespass into the Plaintiff's land?

Having resolved that the suit land belongs to the Plaintiff, the next issue is whether the Defendant trespassed to the suit land. According to PW1, PW4 and PW5, the area that the Defendant resides and which he alleges

the suit land. I have already shown that the alleged allocation, as per Exhibit D4, does not exist. Even if it was to be taken that such allocation was made, the same would not have legal effect. As shown by Exhibit P1 and augmented by Exhibit D2, the suit land is owned by the Plaintiff after he bought it from Mohamed Aziz. The said land has been in continuous ownership of the Plaintiff and Mohamed Aziz for about 16 years now. It could not be taken away from him in 2017 unless the allocating authority complied with the legal requirements relating to land acquisition. There is no evidence that any process leading to acquisition of the suit land or part of it was made by the said Landanai village government. That is without prejudice to the fact that the Defendant's own evidence proves that there had not been any allocation prior to the letter (part of Exhibit D3) dated 6th November, 2020 from District Executive Director for Simanjiro District to the VEO Landanai.

There is no doubt therefore that according to the evidence the Defendant trespassed into the Plaintiff's land. All the Plaintiff's witnesses and exhibits attest to the fact that the suit land is located at Naberera Village and not Landanai village. The two villages were originally part of Naberera village and now form part of Naberera Ward. I should also point out that in the course of the hearing it became apparent that trespass to the Plaintiff's land was continuing, not only by the Defendant but also by other persons allegedly coming from Landanai Village. At some point the Plaintiff testified that the Defendant and his relatives trespassed into the land. This is while this case was pending in this Court. This Court is not in a position to determine the rights or liabilities of parties that are not impleaded in the proceedings. When he was being cross examined by the Defence counsel, the Plaintiff stated that at the beginning the Defendant just constructed in the land, but by now he has trespassed into about 500 acres. This trespass may be as a result of political interference which, unfortunately, commenced while this suit was pending in Court. Exhibits D2 and D3 tendered in Court show that the regional, district and village authorities of the area where the suit land is situated blatantly assumed the duty of the Court of adjudicating over the matter. This was done with knowledge that there was a pending case in Court. The best recourse would have been to request the Court for the said authorities to join the proceedings whereby their issues would be properly adjudicated. There cannot be dual mechanisms of dealing with the same dispute, particularly when the dispute is in the hands of the judicial arm of the government. Such interferences do not augur well with good governance and justice delivery. Courts ought to be left to adjudicate matters presented to them without undue interference from external authorities. Having so said, the

second issue is also decided in favour of the Plaintiff; that is, the Defendant trespassed into the Plaintiff's land.

3.3 To what reliefs are the parties entitled to?

On the reliefs aspect, the Plaintiff claims for both specific and general damages. He claims that the Defendant's cattle did enter his land and destroyed 70 acres of beans and grass that was reserved for the Plaintiff's cattle. To prove this aspect, the Plaintiff summoned two witnesses; namely, Steven Kimani Laizer (PW4) and Peter Losioki (PW5). Pw4 is the Plaintiff's farm manager while PW5 is an Agricultural officer. In his testimony PW4 said the following, among others:

> *"On 05/03/2017 the Defendant allowed his cattle to come and destroy 70 acres of beans farm. Also his cattle entered into cattle grazing area of more than 700 acres. The cattle were in the area for a long time. I took two steps. I reported at Mererani Police and also went to Karanga prison t inform the Plaintiff about the trespass. Police wrote to Afisa Kilimo to assess the damage. I was at the farm when the assessment was done, it was done by Mr. Peter Losioki, who is Afisa Kilimo Kata ya Leisinyai. A report was prepared and submitted. The report was awaiting the farm owner to be released in order to deal with the matter."*

PW4 appeared credible. He was not shaken even during cross examination. His evidence was augmented by that of PW5 who assessed the damage after he was asked to do so by the police, Mirerani. His report was admitted as exhibit P2. He estimated the total loss occasioned by the Defendant's cattle at TZS 520 million shillings. The report was made on 09/03/2017 and submitted to OCS Mirerani on 12/03/2017.

The Plaintiff stated that after he was released from remand and after observing the loss/damage they had a reconciliation meeting with elders

but it was not successful. The Defendant vehemently disputed the evidence about his cattle entering and destroying the Plaintiff's crops and grasses. He alleged that the Plaintiff has grudges against him but he did not explain why the grudges exist. On cross examination, he admitted that the place where he lives is the same area that the Plaintiff says he trespassed into and that he moved there in 2015 before it was allocated to him in 2017.

It is trite law that he who alleges must prove and the standard of proof is on the balance of probabilities. This is in accordance with section 110 of the Evidence Act, Cap. 6 [R.E 2019]. This position was also reiterated by the Court of Appeal in the case of ***Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017 (unreported), in which the Court quoted the statement by Lord Denning in ***Miller Vs. Minister of Pensions*** [1937] 2 All. ER 372 which stated:

> *"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 the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a 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 it more probable than not the burden is discharged, but, if the probabilities are equal, it is not..." (At page 340)."*

From the evidence on record and what I endeavoured to explain, it is my opinion that the Plaintiff has on a balance of probability proved that the Defendant trespassed into his land and that his crops and grasses were

destroyed by the Defendant's cattle. What remains to be determined is whether he is entitled to damages as per Exhibit P2. While I agree with the assessment made with respect to the destroyed beans, I find it difficult to comprehend the alleged destruction on grasses. The report relating to grasses appear to be highly anticipatory. The three years estimation leaves a lot to be desired. Grasses are objects that can grow within a short time. The best cattle can do to grasses is to eat them and leave them to grow. We were not told whether the said grasses are a special type and whether once eaten they wither for life. Furthermore, there was no evidence led to prove that the Plaintiff was doing cattle fattening exercise for commercial purposes. In the absence of cogent evidence, I strike off the amount of TZS 450 million claimed for destruction of grass and substitute it with general damages for trespass as will be stated hereunder.

4. 0 Conclusion and reliefs

As observed above, the Plaintiff has managed on a balance of probability to prove his ownership over the suit land. He has also managed to prove that the Defendant trespassed into part of the suit land without a colour of right. As a result of that trespass, the Plaintiff's farm of beans was destroyed thereby causing a damage of TZS 70 million shillings as per Exhibit P2. The Plaintiff's peaceful enjoyment of the suit land has also been compromised. As discussed hitherto, the claim of TZS 450 million was not proved. The Plaintiff also claims for payment of TZS 220 million per year from the date of judgment to the date of vacant possession. This claim is, in my considered opinion, unnecessary because once the Court pronounces the rights of parties such order has to be implemented

immediately. Delay to implement the same without justification would necessarily attract interest. The Plaintiff also claims for general damages for trespass and eviction of the Defendant from the suit land.

I should point out that general damages are in the discretion of the court to award considering particular circumstance of each case. The Court of Appeal in the case of ***Anthony Ngoo and Another Vs. Kitinda Kimaro***, Civil Appeal No. 25 of 2014 (unreported) confirmed Lord Dunedin's holding in ***Admiralty Commissioners Vs. S.S. Susquehanna*** [1926] A.C 655 where he stated thus:

> *"If damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a question of the jury."*

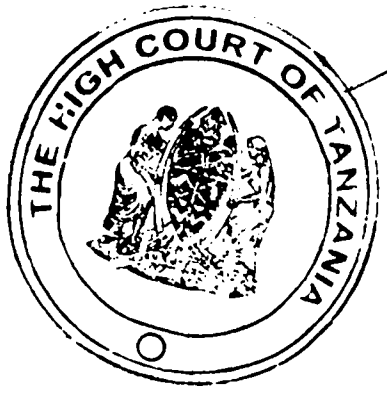
Although we do not have jurors in this country to assess such damages, a judge or a magistrate steps in to assess what is considered to be sufficient considering the circumstances of each case. In this case, there is no doubt from the evidence that the Plaintiff has been, for the past three years or so, denied peaceful enjoyment of his land by the action of trespass of the Defendant. The Plaintiff's farm manager was made to leave as a result of the trespass that was instigated by the Defendant and his allies that are not part of this suit. Let me once again clarify that a court has no jurisdiction over a person who has not been made a party to an action before it. Thus, no judgment or decree in an action is binding on non-parties, nor is any finding made in the course of arriving at the judgment. This is not to say that the Court condones acts of parties not before this Court. It is only to assert that its judgment can only extend to

the issues and parties before it. In that regard, any damage occasioned herein is solely to be shouldered by the Defendant.

On the premises, this Court gives the following orders:

a) The Plaintiff is declared the lawful owner of the suit land comprising of 1000 acres and confirms that the Plaintiff legally acquired the land by buying the same from one Mohamed Aziz;
b) That the Defendant's continued presence in the suit land constitutes trespass. He should vacate the suit land immediately;
c) The Defendant to compensate the Plaintiff for the destruction of crops (beans) to the tune of TZS 70 million as special damages;
d) The Defendant to pay to the Plaintiff TZS 50 million as general damages for trespass;
e) Costs of the suit to be borne by the Defendant.

Order accordingly.



Y. B. Masara
JUDGE
7th May, 2021