

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**[LAND DIVISION]
AT ARUSHA**

LAND CASE NO. 13 OF 2019

BURHAN SAID MLAVI (as a Legal Representative
of Zuhura Abdallah (deceased)) **PLAINTIFF**

Versus

**DMI ST. JOSEPH UNIVERSITY IN TANZANIA,
ARUSHA CAMPUS** **1ST DEFENDANT**

**THE REGISTERED TRUSTEES OF DAUGHTERS OF
MARY IMMACULATE AND COLLABORATORS** **2ND DEFENDANT**

JUDGMENT

19th August & 15th October, 2021

Masara, J.

1.0 INTRODUCTION

The Plaintiff, **Burhan Said Mlavi**, filed this suit as the Legal Personal Representative of the late Zuhura Abdallah, his mother. He sued the two Defendants herein for the following reliefs: a declaration that he is the lawful owner of a piece of land measuring 37.5 acres, Farm No. 409, L.O No. 131048, folio No. 2272 situated at Ngorbob Village, Arumeru District within Arusha Region; an order of vacant possession against the Defendants from the said land; specific damages to the tune of TZS 11,099,400/= being the value of crops destroyed by the Defendants after trespassing into the land; TZS 10,000,000/= per year as annual earnings from farming and crops; general damages; costs of the suit and any other relief the Court may deem fit and just to grant.

In their joint Written Statement of Defence, the Defendants dispute the Plaintiff's claims. They state that the land originally registered as Farm No. 409, L.O 131048, folio 2272 located at Ngorbob Village does not exist since it was legally partitioned, giving rise to Farm No. 1701/1 and 1701/2. According to the

Defendants, the land in dispute measures 17½ acres and has a certificate of title No. 20031 (hereinafter referred to as “the suit land”). They further contend that the land was given to one Neema Issa Nassor, the Plaintiff’s sister. That the said Neema Issa Nassoro sold the suit land to Jitu Investment Co. Ltd, who subsequently sold it to the second Defendant. The Defendants claim to have purchased the suit land lawfully; thus, they are not trespassers. They also deny to have destroyed the Plaintiff’s crops or cause any damage to the Plaintiff as alleged. The Defendants pray that the suit be dismissed with costs.

At the hearing of the suit, the Plaintiff was represented by Mr. Duncan Joel Oola, learned advocate, while the Defendants were represented by Messrs Erasmus D. Buberwa and Ephraim A. Koisenge, learned advocates. The learned advocates for the parties also filed final submissions in support of the evidence adduced.

2.0 PLAINTIFF’S EVIDENCE

The facts relevant to this suit can be summarised from the evidence of the Plaintiff as follows: the Plaintiff (PW1) is the son of the late Zuhura Abdallah. He claims that he was appointed the administrator of the estate of his deceased mother. According to the Plaintiff’s evidence, Zuhura Abdallah owned a piece of land measuring 37.5 acres, registered as Farm No. 409, L.O 131048, folio 2272 situated at Ngorbob village Arumeru District within Arusha Region. She was issued with an Offer of a Right of Occupancy in her name in 1992. The Offer of a Right of Occupancy was tendered and admitted as exhibit P1. According to his evidence, PW1 was paying all land rents and Government taxes, including those of 2020. He tendered four receipts which were admitted as Exhibit P2 collectively. He also testified that he has been using the suit land for farming activities. He told this Court that the said land has never been subdivided because had it been so, he would have been consulted. ~~The Plaintiff~~

further stated that on 18/4/2006 and 01/5/2006, the suit land was trespassed by Jitu Investment Co. Ltd. who said that the land was sold to them by Neema Nassor. PW1 sued both Jitu and Neema in the District Land and Housing Tribunal vide Application No. 71 of 2006. The Plaintiff stated that the Defendants trespassed into 17.5 acres in 2012. On 23/1/2019, the Offer of Right of Occupancy which was registered in his mother's name, was officially registered in the name of the Plaintiff in 2019. He claims to be the lawful owner of whole farm measuring 37.5 acres.

3.0 DEFENDANTS' EVIDENCE

On their part, the Defendants called four witnesses and tendered three exhibits. The gist of their evidence was that they bought the suit land from Jitu Investment Co. Ltd. Goodluck William Mollel (DW1), an Authorized Land Officer, testified that it is true that Farm No. 409, Ngorbob Village originally belonged to Zuhura Abdallah, through an Offer of Right of Occupancy. She partitioned it, and gave 17½ acres to her daughter Neema Issa Nassor. The land was surveyed, and registered with plan number 39405, and a Certificate of Occupancy No. 20031 was issued in the name of Neema Issa Nassor. DW1 told the Court that the Offer of Right of Occupancy that was in the Plaintiff's possession was supposed to be surrendered after the land was surveyed. According to DW1's testimony, on 10/4/2006, Neema Issa Nassor sold the suit land to Jitu Investment Co. Ltd, and on 18/12/2012, Jitu Investment Co. Ltd sold same to the Second Defendant. In the same Farm No. 409, the Plaintiff had sold 8 acres to one Leah Sangawe (DW4). Therefore, according to the evidence of DW1, Farm No. 409 is no longer in existence. When cross examined, DW1 stated that the rent paid for farm No. 409 were illegally paid since PW1 owned exhibit P1 illegally.

Thomson Xavier Anthony Anorld (DW2), the Defendants' Director, testified that the second Defendant bought the suit land from Jitu Investment Co. Ltd on 18/12/2012. The land sold to them was partitioned by Jitu Investment Co. Ltd into two parcels, one is Farm No. 1701/1 and Farm No. 1701/2 with certificates of title No. 20031 and 23408 respectively. The sale agreements were admitted as exhibit D1 collectively. Forms for the transfer of ownership were admitted as exhibit D2 collectively and Certificates of Title in respect of the two plots were admitted as exhibit D3 collectively. The Defendants stated that they bought the two pieces of land for TZS 300,000,000/= each. DW2 added that the land was officially registered in the name of the second Defendant on 21/11/2013. He denied the allegation that they trespassed in the Plaintiff's land stating that the land was lawfully sold to them by Jitu Investment Co. Ltd, after they had made an official search at the land office in Moshi.

The evidence of Tumaini Hemedi Mnkeni (DW3) an officer in the Office of the Registrar of Titles supported that of DW1 and DW2. Leah Thomas Sangawe (DW4) testified that she bought a piece of land measuring 8 acres from the Plaintiff in 2002. While signing the sale agreement, the Plaintiff was accompanied by his mother, the late Zuhura Abdallah. The land she bought, is part of Farm No. 409, and it was in the name of Zuhura Abdallah. When she was processing Certificate of Title, the whole land was surveyed, so that the 8 acres could be deducted. She stated that in 2004 or 2005, other surveyors surveyed Neema's land. Neema sold the land to Chinese nationals who were accompanied by Jitu, who erected a gypsum and conduit pipes factory. After some years, the Chinese and Jitu sold the suit land to the Defendants. DW4 told the Court that at the time the Chinese were there PW1 was also living there. All the defence witnesses therefore urged this Court to declare the Defendants the lawful owner of the suit land.

3.0 ISSUES

Considering the pleadings filed and the consensus of counsel for the parties, the Court framed the following issues:

- a) *Whether the Plaintiff is/was the registered owner of Farm No. 409 situated at Ngorbob Village, Arumeru District Arusha;*
- b) *Whether the said farm was subdivided, and if so, whether the subdivision was lawfully done;*
- c) *Whether the Defendants trespassed to the said farm or part thereof and destroyed plaintiff's crops valued at TZS 11,099,400/=, if so, whether the Plaintiff is suffering loss of TZS 40,000,000/= per annum; and*
- d) *To what reliefs are parties entitled to.*

4.0 DETERMINATION OF THE ISSUES

4.1 Is the Plaintiff the registered owner of Farm No. 409 situated at Ngorbob Village, Arumeru District Arusha?

The Plaintiff's case is that the suit land is part of Farm No. 409, which belonged to his mother, the late Zuhura Abdallah. According to the Plaintiff, since he was appointed as Legal Personal Representative of the late Zuhura Abdallah, and since he has been in occupation of the suit land, the same belongs to him. He adds that the suit land was registered in his name in 2019, therefore he is entitled to be declared the lawful owner.

In his final submission, Mr. Oola stated that the Plaintiff was registered with an Offer of Right of Occupancy (exhibit P1), which has status equal to that of a Certificate of Occupancy. The said offer of a Right Occupancy has never been revoked by any authority; therefore, since the Plaintiff is the registered owner, that is prima facie evidence that he is the lawful owner of the suit land. To support his assertion, he cited the following Court of Appeal decisions: ***Amina Maulid Ambali and 2 Others Vs. Ramadhan Juma***, Civil Appeal No. 35 of 2019 and ***Leopold Mutembei Vs. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another***, Civil Appeal no. 57 of 2018 (both unreported). According to Mr. Oola, the Plaintiff

also testified and proved by evidence that he is the one paying land rent and other government tax, through the receipts (exhibits P2). He questioned how it was possible for the Government to recognize the suit land as Farm No. 409 and continue to bill it if at all it had been partitioned as contended by the Defendants. He made reference to section 33(1) of the Land Act, Cap. 113 [R.E 2019] which mandates land owners to pay annual rent.

The defence evidence is to the effect that the suit land has never been registered in the Plaintiff's name. Farm No. 409 was formerly registered in the name of the late Zuhura Abdallah, but in 2005 it was partitioned, giving rise to the suit land. In their final submission, Mr. Buberwa and Mr. Koisenge, contested the Plaintiff's interest in the suit land. They submitted that the Plaintiff sued as a Personal Legal Representative of the late Zuhura Abdallah, but there was no proof that he was duly appointed by any court to administer the deceased's estate. This, in their view, entails that the Plaintiff has no *locus standi* against the Defendants. To support their assertion, they made reference to decisions in ***God Bless Jonathan Lema Vs. Musa Hamis Mkanga and 2 Others***, Civil Appeal No. 47 of 2012 (unreported) and ***Lujuna Shubi Ballonzi Senior Vs. Registered Trustees of Chama cha Mapinduzi*** [1996] TLR 203. They insisted that since *locus standi* is a legal point, it can be raised at any stage of the case. To support this contention, they referred the Court to the decision in ***Scandinavian Enterprises Vs. Hassan M. Jemadari and others*** [2002] TLR 177.

Notwithstanding the above issue, the advocates for the Defendants submitted on the other issues as framed. Submitting on the first issue, they stated the Offer of Right of Occupancy that was issued on 9/6/1992 in the name of Zuhura Abdallah was not recognized by the Land Office since that land was surveyed and partitioned. They further submitted that, according to DW1, exhibit P1

ought to have been surrendered to the land offices after the land was surveyed. They insisted that the Plaintiff is not the registered owner of Farm No. 409 on the grounds that he does not possess letters of administration of the Estate of the late Zuhura Abdallah, but also, that exhibit P1 was not recognized as the sketch map attached to it has no coordinates but only demarcations.

Having analysed the evidence adduced regarding this issue and final submissions by counsel for the parties., I find it appropriate to determine the concern put forth by the Defendants' advocates regarding the *locus standi* of the Plaintiff to institute this case. At the outset, *locus standi* is a common law principle which requires that a person bringing matter to court should be able to show that his right or interest has been interfered with. This principle was well elaborated in ***Jonathan Lema Vs. Mussa Hamis Mkanga & Two Others*** (supra) and ***Gervas Masome Kulwa Vs. The Returning Officer and Another*** [1996] T.L.R 320.

I have considered the fact that the Plaintiff instituted this case as a Personal Legal Personal Representative of the late Zuhura Abdallah. This is obtained from the heading of the amended plaint, where the Plaintiff stated after his name '*as a legal representative of Zuhura Abdallah (deceased)*'. Also, paragraph 4 of the amended plaint, the Plaintiff stated that he has been occupying the suit land which was registered in the name of Zuhura Abdallah, his mother, but later he reregistered it in his name. Likewise, while testifying, at page,10 of the typed proceedings, he said:

"I am a representative (administrator of the estate) of my mother Zuhura Abdallah ..."

From the above facts, it is worth noting that the Plaintiff's interests in the suit land arise from the fact that he is the administrator of the deceased's estate. In order to prove that the Plaintiff was duly appointed as the Legal

Representative or administrator, as he presented himself, he ought to have furnished the Court with documentary proof by tendering letters of administration or even a judgment of the court that appointed him. In this respect, I am guided by the decision of the Court of Appeal in ***Suzana S. Waryoba Vs. Shija Dalawa***, Civil Appeal No. 44 of 2017 (unreported), where it was held:

*"However, we haste the remark that the omission is not fatal given that it was clear throughout that she was suing in that capacity **and the judgment of the Primary Court which appointed her as such, was tendered in evidence at the very outset.** We only wish to accentuate that when a litigant sues as an administrator or administratrix of estate, it is desirable that the same should be reflected in the title."* (Emphasis added)

Appointment of an administrator of the deceased's estate is a legal process. A litigant cannot merely call oneself the administrator of the deceased's estate in the absence of proof that he/she was duly appointed. The letters of appointment are prima facie evidence that the administrator was duly appointed, and that is what establishes the interest of the administrator over the deceased's estate. The Court of Appeal, while faced with a similar scenario in ***Ally Ahmad Bauda (Administrator of the Estate of the Late Amina Hussein Senyange) Vs. Raza Hussein Ladha Damji***, Civil Appeal No. 525/17 of 2016 (unreported), had this to say:

*"In the circumstances, we agree with the learned advocate for first and second respondents that the deceased Amina Senyange Bauda or Amina Senyange has no interest in the estate of Amina Hussein Senyange. **This means that the applicant has not proved that his right or interest has been interfered with.** The authority in ***Amani Mashaka*** (supra) is thus distinguishable because in that case, Amani Māshaka was the administrator of the late Mwamvita Ahmed who had locus standi to sue under that capacity, **whereas the applicant has not proved to be the administrator of the estate of the deceased.**"* (Emphasis added)

In light of the above authorities, it goes without saying that the Plaintiff has not manifested his interest on the suit land for failure to prove that he was

appointed to administer the estate of the late Zuhura Abdallah. This is taken seriously, considering the fact that the Plaintiff was represented by an advocate who is conversant with rules relating to court appearance and processes. Therefore, I agree with the learned advocates for the Defendants that the Plaintiff failed to prove that his rights or interests in the suit land were interfered with. This, by itself, would suffice to dispose the matter because lack of locus standi renders a suit incompetent. However, for the interest of justice, I have opted against taking that path. I find it imperative to deal with all the issues on merits, lack of locus standi of the Plaintiff, notwithstanding.

Regarding the first issue, it is undisputed that Farm No. 409 Ngorbob Village which measured 37.5 acres belonged to the late Zuhura Abdallah, the Plaintiff's mother. According to PW1's evidence, the suit land was registered in his name on 23/1/2019. In his evidence, the Plaintiff admitted that the farm was trespassed by Jitu Investment Co. Ltd on 18/4/2006 and 1/5/2006. He also admitted that after noting that the suit land was sold to Jitu by her sister, Neema, he sued both of them in Application No. 71 of 2006, in the District Land and Housing Tribunal, where the Defendants thereat were declared trespassers. PW1 told the Court that the Defendants trespassed in the suit land in 2012. The decision was not tendered in Court. The question that arises is, why did the Plaintiff have to wait from 2006 when the suit land was first trespassed and 2012 when the Defendants trespassed it, until 2019 when he applied for registration? Obviously, the answer is that the registration was sought in contemplation of this case. There is no other explanation for waiting from 2005, when Zuhura Abdallah died, to 2019 when the same was allegedly registered in the Plaintiff's name. This casts doubts on the Plaintiff's registration. Furthermore, what is said to be registration is a letter of offer.

Conversely, there is clear evidence from the Defendants witnesses that the suit land was partitioned way back in 2005, while Zuhura Abdallah was still alive. The evidence of DW1, the authorized land officer, is that the land was surveyed in 2005 and was registered with Plan No. 39405, hence certificate of title No. 20031 was issued in the name of Neema Issa Nassor. He also stated that after survey, the Offer of Right of Occupancy (exhibit P1) was supposed to be surrendered in the Land Offices so that it could not be used for other transactions. After being partitioned, according to DW1, Farm No. 409 ceased to exist. He named the Plaintiff's registration illegal. This evidence was well corroborated by that of DW3, an officer from the Registrar of Title's office. That evidence finds support from the neighbour, DW4, who also bought a piece of land measuring 8 acres from the Plaintiff in 2002. According to DW4, when she was processing a certificate of title, the whole Farm No. 409 was surveyed. Owing to that fact, the said farm cannot remain one and the same. Thus, Plaintiff's registration was improperly procured since Farm No. 409 was not in existence as its size was altered. Notably, condition No. 2 in exhibit P1 stipulates that boundaries may be adjusted upon survey. With that piece of evidence, it is justifiable to conclude that Farm No. 409 was not registered in the name of the Plaintiff.

I entirely agree with Mr. Oola that possession of certificate of title to land is prima facie evidence of ownership of land by the possessor. But, I would add that in resolving ownership over a piece of land involving two registered owners, the first to be entered in the land register is considered the lawful owner unless the registration thereof was tainted with fraud or illegality. In the case at hand, the Plaintiff was registered in 2019 while the Defendants were registered as owners of the suit land way back in 2013. Thus, it cannot be concluded that the Plaintiff was registered the owner of the said farm. This view gets credence from the Court of Appeal decision in ***Amina Maulid Ambali and 2 Others***

Vs. Ramadhani Juma, Civil Appeal No. 35 of 2019 (unreported), where it was held:

"In our considered view, when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained."

Further, Mr. Oola suggests that since the Plaintiff was paying rents, he was the registered owner of Farm 409. I do not agree with his line of argument for the following reasons: First, according to exhibit P2, the Plaintiff started to pay land rent in 2016 to 2020 while he claimed to be in ownership of the suit land since 2005. Exhibit P2 shows that they were paid in the name of the late Zuhura Abdallah, and not in his personal capacity. Second, the receipts were not consistent because, in 2016, it shows the amount paid was TZS 201,500/=, in 2017, the amount paid was TZS 199,500/= but surprisingly, in 2020, the receipt shows that the rent paid was only TZS 10,000/=. That is huge variation in terms of the figure. In 2019, the receipt shows that it was not paid for land rent, but sale of plots of 2018 and 2019. When probed on the sale of plots receipt, PW1 stated that it was in relation of sale of the land from his mother to himself. Unfortunately, PW1 forgets that the nature of transfer of the land from his mother to himself as shown in exhibit P1 was by operation of law and not by sale.

In this Court's view the said receipts are doubtful, they cannot be a basis of determining the Plaintiff's ownership of the said Farm, as Mr. Oola suggests. Third, DW1 testified that the Plaintiff was paying rent illegally as the letter of offer was not surrendered. I have no hesitation to agree with DW1 that the purported rent was paid illegally. According to DW2, prior to purchasing the suit land, the Defendants made an official search at the land register in Moshi, which revealed that the suit land belonged to Neema who sold it to Jitu. Since the suit land belonged to Neema in 2006, it cannot safely be said that the Plaintiff

owned Farm No. 409 Ngorbob Village, which also comprises with the suit land. That said, the first issue is resolved in the negative in the sense that the Plaintiff was not the registered owner of Farm No. 409 situated at Ngorbob village, Arumeru District.

4.2 Was the said farm subdivided, and if so, was the subdivision lawfully done?

Having decided the first issue in the negative, this issue's determination becomes less cumbersome. According to the Plaintiff, the suit land was not subdivided. In his view, if there was any subdivision he would have been involved as the owner. In his final submissions, Mr. Oola submitted that it was not possible for the suit land to be transferred to Neema Issa Nassor without consent and approval of the former owner, Zuhura Abdalah. On a further note, the learned advocate submitted that there was no any document tendered by the Defendants purporting that the land was transferred to Neema Issa Nassor, contrary to section 64 of the land Act, Cap. 113, which mandatorily requires disposition of a right of occupancy to be in writing. He averred that the Plaintiff's evidence outweighed that of the Defendants. To support his contention, Mr. Oola referred to the case of *Hemed Said Vs. Mohamed Mbilu* [1984] TLR 113 which encapsulates that a person whose evidence is heavier than the other must win.

On their part, the Defendants' advocates reiterated the evidence adduced by the Defendants' witnesses and submitted that Farm No. 409 was surveyed and subdivided to two persons at the instance of the original owner. They maintained that Farm No. 409 was further apportioned whereby 8 acres were sold to Leah Sangawe. The learned counsel further submitted that the suit land was subdivided by Jitu Investment Co. Ltd into two portions, Farm No. 1701/1 with certificate of title No. 20031 and Farm No.1701/2 with certificate of title

No. 23408, before the two pieces were sold to the Defendants. That is also shown in exhibit D3, which is endorsed 'Partition'.

Determination of this issue hinges more on the evidence from the Defendants' side. Notably, DW4 stated that she bought a piece of land measuring 8 acres from the Plaintiff in December, 2002. The 8 acres came from the original Farm No. 409. She went further to state that in 2003, Farm No. 409 was surveyed when she was applying for a certificate of title. This evidence was not challenged by the Plaintiff. Further, the evidence of DW1 and DW3 who are land officers shed more light on the matter. According to their evidence, the original owner, Zuhura Abdallah, requested apportioning of Farm No. 409. The land was surveyed and it was registered as Plan No. 39405, and certificate of Title No. 20031 was issued. In that subdivision, Neema Issa Nassor was given 17.5 acres. Subsequently, Neema sold the land to Jitu Investment Co. Ltd on 10/4/2006. DW1, DW2, and DW3, testified that the third entry in the Land Register was made on 28/3/2008, when Jitu Investment Co. Ltd partitioned the suit land into 2 farms; namely, Farm No. 1701/1 with certificate of title No. 20031 and Farm No. 1701/2, with certificate of title No. 23408, each measuring 3.695 hectares. On 18/12/2012, Jitu Investment Co. Ltd sold the two partitioned farms to the Defendants.

DW1 and DW3 explained the chronological entries in the register which casts no doubt that the suit land was partitioned. They stated how the original farm was partitioned, giving rise to the suit land. DW1 and DW3 are experts in land matters, and they testified according to what they found in their office records. They are also issuers and custodians of land-ownership documents. I have no reasons to doubt their evidence. Their evidence was cogent. In this stance, I subscribe to the decision in ***Leopold Mutembei Vs. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban***

Development and Another (supra), referred to me by Mr. Oola, where it was held inter alia that:

"Conversely, the respondents' witness (DW1 Ms. Mziray) adduced on the chronology of ownership of the disputed land and confirmed that the registration of Mr. Airo's title was faultless. In comparison with the appellant's evidence, we think Ms. Mziray's account is more cogent."

According to the defence evidence, prior to partitioning of Farm No. 409, two surveys were conducted. The first survey was with respect to the land bought by DW4. This was done when she was processing a certificate of Title in 2003. The second one was made in 2005, when the late Zuhura Abdallah was allocating the suit land to her daughter, Neema Issa Nassor. In the pleadings and in his evidence in Court, the Plaintiff did not contest such surveys. Since the Plaintiff did not dispute the said surveys, I find it difficult to agree with Mr. Oola that such surveys were made without the involvement of the Plaintiff. The evidence before this Court suggests that Neema Issa Nassor is the blood sister of the Plaintiff. The Plaintiff does not state whether she was not entitled to a portion of her mother's land. Any partition of the Farm must have involved all interested parties to the land. This was the holding of the Court of Appeal in ***Obed Mtei v. Rukia Omari*** [1989] TLR 111, where it was held:

*"Normally before we make any survey it is the duty of the Land Officer to make sure that **all third party interests are cleared and if it is a farm, the land officer must see to it that the owners agree on the boundaries.**"* (Emphasis added)

Ancillary to that, exhibit D3 supports the fact that the Farm was partitioned. The exhibit shows the transfer of the suit land from Neema Issa Nassor to Jitu Investment Co. Ltd, and later how it was transferred from Jitu Investment Co. Ltd to the Defendants. Exhibit D3 also shows the partition made by Jitu Investment Co. Ltd. Mr. Oola contended that there is no documentary proof of transfer of the suit land from Zuhura Abdallah to Neema Nassor. I agree with him that there is no such document; however, I am persuaded by the evidence

of DW1 and DW3, the land officers, that Farm No. 409 was divided at the instance of the late Zuhura Abdallah. Their evidences stem from cogent records obtained from the Land Office. Furthermore, DW2's evidence is that prior to purchasing the suit land from Jitu Investment Co. Ltd, the Defendants made an official search at the land registry in Moshi. In that search, they concluded that the land originally belonged to Neema before she transferred it to Jitu Investment.

Before concluding this issue, I need to say a few words regarding the submissions made by Mr. Oola that if there was title No. 20031 partition, then the same was fraudulently created by Neema Issa Nassor and her allies who were not brought to testify. In real sense, Mr. Oola is alleging that there was fraud perpetrated by Neema Issa Nassor and "her people". With respect, the learned advocate misdirected himself. Fraud is a serious allegation and it ought to have been part of the pleadings filed by the Plaintiff. It should not have been muted only to appear in the final submissions. Order VI Rule 4 of the Civil Procedure Code, Cap. 33 [R.E 2019] provides:

"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence and in all other case in which particulars may be necessary to substantiate any allegation, such particulars (with dates and items if necessary) shall be stated in the pleading."

The allegation of fraud was not pleaded in the amended Plaintiff and it was not substantiated in the Plaintiff's evidence. Parties are bound by their own pleadings. This was restated by the Court of Appeal in the case of **Agatha Mashote Vs. Edson Emmanuel and 10 Others**, Civil Appeal No. 212 of 2019 (unreported), where it was held:

"It is settled law that parties are bound by their own pleadings and that a party shall not be allowed to depart from his pleadings to change its case from what was originally pleaded. This entails a party parading the evidence to prove or support what he has pleaded bearing in mind, as

earlier stated that, he who alleges has a burden of proof as stipulated in section 110 of the Evidence Act [CAP 6 RE.2002].”

I should also add that the Plaintiff's evidence is very doubtful in this respect. In Court he testified that in 2006 he sued Jitu Investment Co. Ltd, Neema Issa Nassor and the Defendants, while at the same time he stated that the Defendants trespassed in the suit land in 2012. The Plaintiff also could not even state the year that his mother, Zuhura Abdallah, died. Seeking inspiration from the case of ***Hemed Said Vs. Mohamed Mbilu*** (supra), I find the defence evidence to have more weight than that of the Plaintiff's side with regard to portion of Farm No. 409. I hold this view because apart from the witnesses who testified, their evidence was supported by documentary proof. Fortified by the above reasoning, it is my considered view that the said Farm No. 409 was subdivided way back 2002. I am equally of the view that the subdivision was lawfully done. As per the evidence of DW1, the subdivision was initiated by Zuhura Abdallah, the owner of the farm. The second issue is thus resolved in the affirmative.

4.3 Did the Defendants trespass to the said farm or part thereof and destroyed plaintiff's crops valued at TZS 11,099,400/= ? If so, is the Plaintiff suffering a loss of TZS 40,000,000/= per annum?

This issue need not detain me. In paragraph 6 of the amended Plaint the Plaintiff alleges to have suffered damages after the Defendants trespassed in the suit land. A determination made in the preceding issue makes this issue less important. In the first place, as demonstrated above, the claim that the Defendants trespassed into the Plaintiff's land is devoid of any proof. Further, the Plaintiff did not adduce or tender evidence to prove that there were crops in the suit land at the time the Defendants allegedly trespassed therein. The extent of the damage is also without an iota of proof. Worse still, even in the final submissions, the Plaintiff's advocate did not say anything about this issue.

On that account, the issue of damages suffered by the Plaintiff is baseless. It is therefore determined in the negative.

4.4 To what reliefs are the parties entitled to?

The reliefs claimed by the Plaintiff are for a declaration that he is the lawful owner of a piece of land measuring 37.5 acres, Farm No. 409, L.O No. 131048, folio No. 2272 situated at Ngorbob Village, Arumeru District within Arusha Region; an order of vacant possession against the Defendants from the said land; specific damages to the tune of TZS 11,099,400/= being the value of crops destroyed by the Defendants after trespassing into the land; TZS 10,000,000/= per year as annual earnings from farming and crops; general damages; costs of the suit and any other relief the Court may deem fit and just to grant. The Defendants urged the Court to declare the Defendants lawful owners of the suit land and dismiss the suit with costs.

With respect, having scrutinized the evidence from both parties, and from what I have endeavoured to stated in the preceding issues, the Plaintiff has failed to prove entitlement to any of his pleaded claims. It was incumbent for the Plaintiff to prove his claims. The Plaintiff's evidence regarding ownership of the suit land left a lot to be desired. He claimed for the entire 37.5 acres originally owned by the late Zuhura Abdallah. It appeared that such claim could not be sustained considering that he had sold 8 acres to DW4 and 17.5 acres were lawfully handed over to his sister Neema Issa Nassor by her late mother, Zuhura Abdallah, who in turn sold it to Jitu Investment Co. Ltd. The Defendants and their witnesses proved by documentary evidence that they occupy the land lawfully as they bought the same from Jitu Investment Co. Ltd.

In Civil Cases, the standard of proof is on the balance of probabilities. In this respect, I am guided by the Court of Appeal decision in ***Paulina Samson***

Ndawavya Vs. Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017 (unreported), which quoted the statement by Lord Denning in ***Miller Vs. Minister of Pensions*** [1937] 2 All. ER 372 where it was 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)."

The Defendants proved their ownership over the suit land on a balance of probability.

5.0 CONCLUSION

From the above, The Defendants are declared lawful owners of the suit land measuring 17.5 acres. They should be allowed to use the said land which they legally acquired. For avoidance of doubts, the Defendants are not trespassers to the suit land. Further, since Farm No. 409 Ngorbob Village, Arumeru District no longer exists after it was partitioned, registration of title issued in the name of the Plaintiff on 23/1/2019 is declared null and void. The suit is dismissed in its entirety. The Plaintiff shall pay costs to the Defendants.

Order accordingly.




Y. B. Masara
JUDGE

15th October, 2021