

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

LAND CASE NO. 10 OF 2021

**SAIMONI SUNG'ARE (As an Administrator of estate of the late
NASERIAN LOISUJAKI SUNG'ARE) PLAINTIFF**

VERSUS

NGORBOB VILLAGE COUNCIL1ST DEFENDANT

THE ARUSHA DISTRICT COUNCIL.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

17/03/2023 &18/05/2023

GWAE, J

In this court, the plaintiff, Saimoni Sung'are has filed this case suing as an administrator of the estate of the late Naserian Loisujaki Sung'are (deceased) who passed away on 30th March 2010. The plaintiff's case is against the defendants namely; Ngorbob Village Council, Arusha District Council and the Attorney General, herein under be referred to as the 1st, 2nd and 3rd defendant respectively.

According to the plaintiff's plaint, in 1960 the deceased person leased the suit land measuring about six to eight (8) acres located at Ngorbob

Village, Mateves Ward within Arusha District in Arusha Region to the then Arumeru District Livestock and Agricultural Department for the purpose of demonstrations. The boundaries of the suit land, unsurveyed land are as follows; from North-Arusha to Dodoma Road and a building owned by one Samwel, from East-Korongu (Loolera), West, the deceased person's family and one Shadrack Miagee Lukumay and South Golden Land shelter Co. Ltd (Garage).

The plaintiff further avers to the effect that, in 1970 after agricultural exhibitions the deceased person took over the possession of the suit land and peacefully kept continuing using it until in the year 2002 when the 2nd defendant's employee one Achi Board Tarawia illegally entered into the suit land. The plaintiff also avers that, the 1st defendant is on the process of regularization (urasimishaji) of the suit land.

Following the alleged trespass by the defendants, the plaintiff is now before the court praying for judgment and decree against the defendants jointly and severally in the following terms;

- a. Declaration that, the suit land is the lawful property of the late Naserian Loisujaki (deceased)
- b. Declaration that the defendants herein are trespassers

- c. An order of eviction from the suit land against the 2nd defendant's employee
- d. Permanent injunctive order be issued against the defendants, their relatives, agents or any other person acting under their instructions from interfering with the plaintiff's suit property
- e. General damages
- f. An order of payment of the costs of the suit
- g. Any other or further reliefs this court may deem fit to grant

On the other hand, the defendants herein through their joint written statement of defence vividly denied the plaintiff's claims by averring that, the disputed land is the lawful property of the Government of the United Republic of Tanzania since 1960s. That, the Government owned the suit land through its Ministry of Agriculture and Livestock until in the year 1982 when the Local Government Authorities were established and the Arumeru District Counsel became the owner of the same adding that, the suit land is now used for various public social services. The defendants then prayed for an order dismissing the plaintiff's suit with costs and declaration that, the 1st defendant is lawful owner of the suit land.

By virtue of Order VIII D Rule 40 (1) of the Civil Procedure Code, Cap 33 R. E, 2019 (the CPC) the following issues were consensually framed immediately before commencement of trial;

1. Whether the suit land is time barred
2. Whether the late Naserian Losujaiki leased the suit land to the defendants in 1960
3. Who is the lawful owner of the suit land
4. To what reliefs are the parties entitled to

In proving his case, the plaintiff paraded a number of six witnesses namely; Justine John, Lembrace Mejoole Sung'are, Lemoipo Kichaeche, Edeshi Loisujaki Elias Sung'are and Saimoni Sung'are who shall be referred to as PW1, PW2, PW3, PW4, PW5 and PW6 respectively. In essence, the evidence adduced by the plaintiff's witness is to the effect that; the deceased, Naserian and her late husband known by the name of Loisujaki Sung'are had acquired a parcel of land measuring more than 50 acres in the year 1960s. It is also the evidence of the plaintiff establishing that, the deceased distributed her properties including her farm while she was still alive to her children except the suit land.

It is further the testimonies of the plaintiff's witnesses that, in the year 1960 the local chief, Zephania successfully approached the deceased person with a view of being given a parcel of land out of her land measuring about 50 acres for livestock and agricultural researches and

exhibitions. The then Arumeru District Council now the 2nd defendant went on using the suit land for the intended purposes until 1970 when it was returned to the deceased person. It is further the plaintiff's evidence that during the 1965 to 1970, the 2nd defendant managed to build block house, water well as well as turf.

However, there are contradictory pieces of evidence adduced by the plaintiff's witnesses on whether there were persons who lived in the houses built by the 2nd defendant through the Ministry of Livestock and Agriculture. The PW1 testified that, there was one Albert (DW1) since who was invited by the deceased to live therein from 1970 to 1980 whereas the PW5 has testified that the suit land was never occupied by anybody since its return by the 2nd defendant in the year 1970 except the deceased who was farming maize and beans. The plaintiff has also produced a police loss report and a copy of the letters of administration granted to him by Arusha Urban Primary Court (PE1).

On the other hand, the defendants entered their defence via their four witnesses namely; Albert Masongonya Kipembe (DW1), Archi Board Tarawia (DW2), Salum Sembe Omari (DW4) and Mohamed Said Nassor (DW4).

Through DW1, the defendants testified that, the suit land is the lawful property of the Government of the United Republic of Tanzania under the Ministry of Agriculture and Livestock by then, now under the ownership of the 1st defendant, He went on testifying that, the suit land was being occupied by Mwalimu Rajabu prior to his occupancy in 1982. DW1 also testified that there was one mwalimu Mshana who happened to occupy the suit land.

It is also the testimony adduced by the defendants' witnesses (DW1, and DW2), the livestock and agricultural officer working in both Ngorbob village and Mateves Ward since 1993 to 2022 when he compulsorily retired from his employment, that he (DW2) he had been living in the suit house as an employee of the 2nd defendant.

The defence is further to the effect that, there had been handing over of the suit property from one leadership to another especially DW3 and DW4 who are currently the 2nd defendant's agricultural and livestock officer and the 1st defendant's chairperson respectively. Generally, the defendants' witnesses told court that, the suit is the lawful property of the 1st defendant for quite a long period adding that, the plaintiff's suit is time

extremely barred. Eventually, the defence sought an order declaring the defendants rightful owners of the suit land.

After the close of each party' case, the court visited the locus in quo after the consensus between the parties' advocates and the following were the court's observations;

1. That, the land suit is measuring about 6.5 to 8 acres
2. That, the actual boundaries of the suit land is as follows from, East there is a valley (Korongo), West-the residential house of Mr. Shadrack Lukumay (One who is married to the Daughter of PW4 and the family of the late Naserian including PW4, North-Road from Arusha to Manyara Region and Samwel Ndagala who is the owner of the suit land measuring more than 5 acres sold to him by the late Naserian extending to Tembo Club. From South of the disputed land-Garage and a house occupied by the daughter of the late Naserian.
3. That, there is a permanent blockhouse where government employees, primary teachers and livestock and agricultural officers were residing (DW1, DW2 and others).

4. There also two (2) dilapidated timber houses where DWI happened to live in one of the two houses in 2008. There is also water well and water turf
5. The main block house has two living rooms and one sitting room as well as its servant quarter with two rooms
6. The block house seems to have been built more than 40 years back and it is repairable
7. The suit land is currently not occupied by anybody since DW1 had vacated after his compulsory retirement in the year 2022
8. There are signs demonstrating that, the suit land was being used for both farming and grazing as well.

After the court had visited the suit land, the parties' advocates sought and obtained the court's leave to file their final written submissions, which I shall not reproduce however, the same is going to be a guidance when composing this judgment.

Having briefly outlined the parties' pleadings, the parties' respective evidence and brief observations pertaining to the court's visitation of the locus in quo, I am now obliged to determine issues framed above as herein under;

Court's determination on the first issue on whether the plaintiff's suit land is time barred

I am aware that the defendants' counsel raised the issue of limitation of time in respect of the plaintiff's suit and this court heard and determined his preliminary objection. The court's ruling was delivered on 18th March 2022 overruling the objection canvassed by the defendants. The basis that led the court to overrule it was, it required court's ascertainment of some facts or evidence including whether the suit land at hand is the same as in the plaintiff's former case filed in the District Land and Housing Tribunal of Arusha (DLHT) (Application No. 30 of 2008).

After hearing of this suit, the evidence adduced by the parties' witnesses establishes that, the suit land that was in the plaintiff's former case before DLHT is the same as in the present dispute. The only the area of controversy between the parties is the size of the suit land which, in my considered view does not make any legal difference taking into account that, was a mere estimation. The size of the land is not certain simply because the disputed land is not surveyed and no an expert who measured it. Hence, its size is just an estimated between 6-8 acres as done during the court's visitation of the suit land.

Now, on whether the suit is time barred or not, it is the version of the plaintiff that, the deceased person hosted the defendants in the suit land for temporary use in the year 1965 but it was returned to her in 1970 upon completion of the agricultural and livestock researches and exhibitions. It is however, trite law that during bonafide prosecution of a case before a court of law where a proceeding is founded in the same cause of action like the present matter before DLHT but such court lacks jurisdiction or such case suffers from other legal technicalities. In that situation, the Law of Limitation excludes the period during such pendency of the plaintiff's suit. This legal position is clearly provided for under provisions of section 21 of the Law of Limitation Act, Cap 89, Revised Edition, 2019 (LLA) which read and I quote;

"21.-(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is incompetent to entertain it.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) For the purposes of this section-

(a) A plaintiff or applicant resisting an appeal shall be deemed to be prosecuting a Proceeding

(b) References to a plaintiff, defendant or other party to a proceeding include references to any person through or under whom such plaintiff defendant or party claims;

(c) Misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with the defect of jurisdiction.”

In our instant dispute, the period from 2008 when the matter was filed before DLHT to 12th day of December 2019 when DLHT strike out the plaintiff's suit is excludable by virtue of section 21 (1) of Part I to the schedule of the LLA. Therefore, if I was to take the plaintiff's position that, the parties' dispute arose in 2002 when DW2 trespassed the suit land especially by farming, the plaintiff's suit could not be time barred since the

period of pendency of the matter before the tribunal ought to be legally excluded.

More so, I find the plaintiff to have pleaded exclusion in Paragraph 12 of the plaintiff's plaint. Hence, compliance with Order VII Rule 6 of CPC salvaging his suit by maintaining that, he prosecuted the same case in the wrong court forum (DLHT) or the same was struck out due to legal technicalities. The court of Appeal in **Fortunatus Masha and another vs. Claver Motors Limited**, Civil Appeal No. 144 of 2019 emphasized the legal requirement to plead the exclusion when it stated;

"Likewise, there was no dispute on the requirement under Order VII Rule 6 of the CPC, for a suit instituted out of the prescribed time, its plaint should contain a paragraph indicating a ground upon which an exemption from such delay is claimed.....the requirement imposed by the above law is not optional, because the word used therein is shall which denote a mandatory compliance and not otherwise..."

In our present suit, the plaintiff has vividly pleaded the exemption from which the delay is claimed under paragraph 12 of the plaint when vividly pleading that, he brought the dispute at hand to the attention of DLHT February 2008. Therefore, the defendants' submission that there are

19 years that had lapsed since the course of action arose in 2002 to when this suit was instituted in this court on 22nd May 2021 is unattainable. I am holding so simply because there is clear evidence adduced by the parties relating to the plaintiff's institution of the suit of this nature before the DLHT, which is not the case.

Furthermore, arguments by the plaintiff's counsel that, in trespass to land, the time will not accrue provided that, the act is continuous is unfounded since time starts to run against the owner immediately after being aware of the complained trespass. This position of law is well spelt under section 5 (1) of LLA, which provides that accrual of action is on which the cause of action arises.

Similarly, if I were to positively consider the defendants' stance that, the defendants' started occupying or they acquired the disputed land since 1960s, the plaintiff's suit would be time barred. Thus, the same would face the consequential order stipulated under section 3 (1) of the LLA read together with item 22 of the LLA read together with section 9 (1) of the Act which require a suit for recover of a land be filed within a period of twelve years. The Court of Appeal of Kenya in the case of **Public Trustee and**

another v Wanduru (1976–1985) 1 EA 488 had these to say in this legal aspect;

"The absent registered owner always retains the legal estate and this prime facie entitles him to resume possession from anyone in possession or actual occupation from the date (thereof) but if he does not exercise it he may not bring an action to recover the land after the end of twelve years."

See also judicial jurisprudence in **Maigu E. M. Magenda vs. Abrogast Maugo**, Civil Appeal No. 218 of 2017 and **Bhoke Kitang'ita vs. Makuru Mahemba**, Civil Appeal No. 222 of 2017 (both unreported) Court of Appeal of Tanzania sitting at Mwanza.

Considering the rival evidence adduced by the parties, it is therefore not safe at this moment to hold that, the plaintiff's suit is time barred basis being the court's demonstrations herein unless the parties' evidence is thoroughly evaluated in its totality as I shall discuss in other issues herein under.

In the 2nd issue on whether the late Naserian Loisujaki leased the suit land to the defendants in 1960

According to the plaintiff's plaint at paragraphs 7 and 8, the plaintiff leased the land in dispute to the defendants for agricultural and livestock

exhibitions and researches in 1960 and that the same was returned in 1970 when the late Naserian Losuijaki re-possessed and started re-using it for farming and grazing. Nevertheless, during hearing, the plaintiff's witnesses testified that, the defendants were merely invited to temporarily use it for agricultural exhibitions and researches.

On other hand, the defendants' witnesses patently and seriously disputed the plaintiff's assertions by stating that the formerly the disputed land was under Ministry of Agriculture and Livestock (Ministry) now local government. The defence also testified that, the government employees including DW1 who lived since 1982 to 2006 and DW2 who lived since 2006 to 2022 had occupied the same when he compulsorily retired from his employment.

Had the late Naserian leased the suit to the defendants from 1965 to 1970 there could, in my considered view, be documents or oral evidence establishing that the plaintiff was being paid certain amount by the defendants as rental fees. The plaintiff was thus bound by his own pleadings at paragraph 7 when he stated that, the suit land was leased to the then 2nd defendant. Thus, departure from it would be by way of an amendment and not otherwise. I subscribe my holding by the cased law in

Makori Wassaga vs. Joshua Mwaikambo (1987) TLR 88 (CAT) where it was held;

“A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case”.

In instant suit, according to the evidence tendered by the plaintiff's witnesses, I am not convinced to hold that the plaintiff's witnesses who testified that, the deceased gave the Ministry now 2nd defendant through chief Zephania for temporary Agricultural exhibitions and researches is in conformity with his pleading at paragraph 7 of the plaint. Temporary giving and leasing are two unlike terms. Hence, the plaintiff in law was supposed to summon his witnesses to prove what he has pleaded. Otherwise, he would only depart from his own pleadings duly filed in court only after leave of an amendment has been sought and obtained.

Assuming that, the word “lease” was intended to mean hosting or free giving of the property for agricultural demonstrations or any other purpose but the same shall be returned on demand by the owner or upon completion of the intended certain purposes by invitee. If that was the position through the plaintiff's plaint, yet the plaintiff's evidence is so diversity since it is to the effect that, the late Naserian re-possessed the

suit land since 1970 and from there onwards, nobody was using the same save DWI who according to the testimony of PW1, he sought the consent from deceased.

I am alive of the principle that the invitee cannot overthrow or exclude his host relying on the doctrine of adverse possession as correctly submitted by the counsel for the plaintiff as was rightly stressed by the Court of Appeal in **Maigu E. M. Magenda vs. Abrogast Maugo** (supra) , where it was held and I quote;

"Although the appellant has argued that he had exclusive ownership over eighteen years before the respondent staked his claim of ownership in 2012, we do not think that continuous use of the land as an invitee or by building a permanent house on another person's land or even paying house rent to the City Council of Mwanza on his own name would amount to assumption of ownership of the disputed plot land..."

Basing on the above case law, had the plaintiff pleaded and proved to have hosted the defendants, the structures built on the suit land that alone would not justify this court to hold that, the defendants are lawful owners merely because they had made developments over one's lawful property. Similarly, the fact that the defendants' employees started living

thereat for long period cannot establish ownership against the rightful owner of the suit land. However, in our present case, that is not the position since the plaintiff's stance is that the defendants ceased to be invitees since the year 1970. The 2nd issue is therefore not answered in affirmative.

As to the 3rd issues on who is the lawful owner of the suit land

As general principle, a party who claims existence of certain facts, which are in controversy, such party in a legal proceeding must prove the existence of such facts. Hence, in civil proceeding, a party has to establish that a certain contentious fact actually happened or that fact did not really happen. The Court of Appeal of Tanzania stressing the same scenario in **Godfrey Sayi vs. Anna Siame** (as legal representative of the late Mary Mndolwa) Civil Appeal No. 112 (unreported) had these to say;

"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities."

In the suit under consideration, the plaintiff bears the burden of proof to the required standard that the suit property in dispute is the lawful

property of the late Naserian Loisujaki. In my due scrutiny of the plaintiff's evidence, it is not certain on whether the suit land was leased on whether from 1970s to 2002 there suit land was occupied by the invitees. Thus, the evidence adduced by the plaintiff's side is found to be contradictory in the following ways. PW1 is found testifying that, it was the said Mwalimu Albert (DW1) who lived in the suit land from 1977to 1980 whilst there is another plaintiff's witness (PW5) who testified nobody who lived in the suit land since it was returned to the deceased except Archi Board (DW2) who trespassed to the suit land in 2002.

More so, the plaintiff's plaint is to the effect that, the suit was given to the defendants since 1965 until 1970 on condition that the same would be returned on accomplishment of the livestock and agricultural researches and exhibitions. That means from 1970 to 2002 the suit land had been occupation of the late Naserian Lsuijaki Sung'are who was farming therein and nobody that was occupying it. There is also evidence on the part of the plaintiff's side that, the Government was in occupation by virtue of being an invitee to the late Naserian. These are contradictory pieces of evidence, in my apprehension, the contradictions go the root of the case. For easy of

reference, parts of the plaintiff's plaint and evidence are reproduced herein under;

*"Para. 7. **That**, sometime 1960s the **Deceased leased the disputed land** to Arumeru District Livestock and Agricultural Department for the purpose of Agricultural and livestock demonstrations*

*Para. 9. **THAT**, in 1970 after the demonstrations, the **deceased took over possession of land and use it peacefully** by growing seasonal crops..."*

*Para. 10. **THAT**, in 2002, the 2nd defendant without any justification illegally entered into the suit land..."*

PW1's testimony

*I do remember that in 1977-1980, one Albert, a **Head teacher of Kambi ya Maziwa Primary School** approached the deceased in order that, he could be **permitted to temporarily live in the blockhouse***

PW5XXD

There was no any person who was living therein. I had never seen any person living in the suit land, which is my knowledge relating to the suit land".

PW6XXD

*The **suit land had never been occupied by any person except the deceased and the Government as an invitee**. I was told by the deceased's person that the disputed farm was about to be grabbed by the 1st defendant. The dispute arose even during the period when the deceased person was alive (emphasis supplied).*

Going by the oral evidence and plaintiff's pleadings, I find contradictions and diversity from the plaintiff's evidence and his pleadings. The plaintiff's evidence brings me to find that, it is more improbable that the deceased to have either re-possessed the suit since in 1970 until 2002 or whether she hosted the defendants since 1970 to 2002. The Court of Appeal of Tanzania when faced with a similar situation in **Dickson Elia Nsamba Shapwata and Another vs. Republic**, Criminal Appeal No. 92 of 2007 (unreported) at page 7 while quoting with approval of the authors of Sarkar, The Law of Evidence, 16th Edition, 2007 had this to say:

"Normal discrepancies in evidence are those which are due to normal errors of observation normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

I would also like to subscribe my holding in the decision of the Court of Appeal in **Sahoba Benjuda vs. The Republic**, Criminal Appeal No.96 of 1989, where it was held that: -

"Contradiction in the evidence of a witness effects the credibility of the witness and unless the contradiction can be ignored as being minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point **unless it is supported by some other evidence.**" (Emphasize is mine)

Being guided by the above judicial jurisprudence, I find the plaintiff's evidence is contradictory affecting its credibility unlike the defence. The defence evidence is credible with effect that, the government is the lawful owner of the suit land and that, her employees had been living in the suit land even prior to 1982 up to 2022 (See evidence adduced by DW1 and DW2). As such I find credible evidence adduced by the defence that, there had been handing over of the suit land and other valuable properties located therein for a long period among the Government employees while the plaintiff is contending that the dispute arose in the year 2002. Hence, I unhesitatingly find the defendants are lawful owners of the disputed piece of land.

In the last issue on reliefs, it is common ground that, the reliefs follow after a party has been declared a winner in a civil litigation. In our case, the plaintiff has failed to prove the case. Therefore, he is not entitled

to any relief as opposed to the defendants who are declared the rightful owners of the suit land.

Consequently, the plaintiff's suit is dismissed. The defendants are lawful owners of the suit land. In the circumstances, I decline granting costs of the case


It is so ordered.

DATED and **DELIVERED** at **ARUSHA** this 18th May 2023


M.R. GWAE,
JUDGE

Court: Judgment delivered this 18th May 2023 in the presence of **Mr. Nangawe**, the learned advocate for the plaintiff and **Mr. Lewan Mbise**, the learned state attorney for all defendants. Copies of judgment, decrees and proceedings are collectable by 25/ 05/2022 as I am going today to visit locus in quo in Manyara Region.




M.R. GWAE,
JUDGE
18/05/2023