IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA

LAND CASE NO. 16 OF 2018

KILAMIAN LELAA ..... PLAINTIFF

Versus

NDOIKA LELAA ..... 1ST DEFENDANT

KARAKAI SAIGURANI ..... 2ND DEFENDANT

KURESOI LENAISIWAN ..... 3RD DEFENDANT

JUDGMENT

26th August & 22nd October, 2021

Masara, J.

1.0 INTRODUCTION

The Plaintiff, **Kilamian Lelaa**, is suing the Defendants for trespassing in his piece of land measuring 87.3 acres, located at Meserani Juu village, Monduli District within Arusha Region ("the suit land"). In the Plaint, the Plaintiff sought the following orders: an order stopping the Defendants from interfering with the suit land for whatever purpose; general damages; costs of the suit; payment of 7% interest per annum on the general damages from the date of filing the suit to the date of payment of the same and such other and further orders that the Court may deem appropriate and just to grant.

In their joint Statement of Defence, the Defendants denied the Plaintiff's claims stating that the suit land is under the first Defendant, who was dully appointed as the administrator of the Estate of their late father, thus the land was distributed to the lawful heirs including the Plaintiff. They further state that the suit land is not the Plaintiff's property because by 1980's when the Plaintiff claims that the land was bequeathed to him by his father, he was a young boy who could not own land. The 3rd Defendant denied entering into the plaintiff's land in 2012, cultivating the same stating that the land measuring 16 acres was

lawfully sold to him by the 1st Defendant. They pray for dismissal of the suit with costs.

At the hearing of the suit, the Plaintiff was represented by Ms Edna Mndeme, learned advocate, while the Defendants were represented by Mr. Joshua Minja, learned advocate. The learned advocates also filed final submissions.

2.0 EVIDENCE FROM THE PLAINTIFF

The Plaintiff informed the Court that in 1980, he was given a piece of land measuring 105.3 acres by his father, the late Lelaa, who died in 1981. The land given to him borders Naibara to the North, Village land and Amani Torongei to the South, Mzee Geri and Amani Torongei to the East, and village farm to the West. Out of the farm given to him, he sold 18 acres and remained with 87.3 acres. He constructed a house therein and the remaining part he used for agricultural activities and cattle grazing. The Plaintiff informed the Court that he lives in the same farm to date. That in 2011, the 1st Defendant colluded with the 2nd Defendant who was a middleman (dalali) and sold the suit land to the 3rd Defendant. The Plaintiff got to know that his farm was sold after the Defendants started cultivating in the farm and cut down some trees. The Defendants cultivated about 4 acres. They cultivated behind and in front of the Plaintiff's farm. The Plaintiff reported the matter to the village office and later sued the Defendants in the District Land and Housing Tribunal vide Application No. 20 of 2012. In the Tribunal, it was observed that the value of land was high; they were advised to file the same in this Court.

The Plaintiff also informed the court that due to this dispute, he was assaulted by the Defendants using machete (panga) and sticks. As proof that he owns the suit land, the Plaintiff tendered minutes of the village assembly which was admitted as exhibit P1. He also tendered another letter from VEO Meşerani Juu Village (exhibit P2). The Plaintiff also surveyed the land by using a government

surveyor and its size was ascertained. The survey report was admitted as exhibit P3. According to the Plaintiff's evidence, his brothers were also given land, but all of them sold their lands and moved to other villages.

3.0 DEFENDANTS' EVIDENCE

On their part, the Defendants denied trespassing into the Plaintiff's land. The 1st Defendant (DW1) told the Court that in 2017 he was appointed as the administrator of the Estate of the late Lelaa Seneu, who was their father. That after being appointed the administrator, he distributed the land that was left by their father to all heirs, including the Plaintiff who was given 30 acres. The other heirs were given 16 acres each. DW1 further stated that when his father died in 1980 the Plaintiff was a young boy of 15 years, so he could not be allocated land by his father. In his evidence, DW1 admitted that he sold a piece of land measuring 16 acres to the 3rd Defendant. He stated that the land he sold is the one allocated to him as his share from their father's land, but he did not sell the Plaintiff's land. He stated that the land was sold to the 3rd Defendant in 2011.

The 2nd Defendant (DW2) testified in Court that he was the ten-cell leader from 2003 to 2017; and that he was a member of the Village Council since 2009 to 2014. He denied being a broker (dalali) as alleged by the Plaintiff. Regarding exhibit P1, he stated that the same was not genuine because it did not contain names of the attendees and their signatures, other than the Village Council members. He also disputed exhibit P2 as it did not have the size of the alleged farm, and that there are no minutes of the Village Council to support it. DW2 also admitted that DW1 sold the land to the 3rd Defendant in 2011. According to DW2, in 1980, the Plaintiff was a young boy, whose age was less than 17 years old.

The 3rd Defendant (DW3) told the Court that he has two farms; the one he inherited from his parents and the one that he bought from Lelaa's family. That he bought 16 acres of land from the 1st Defendant, and 28 acres others from Lelaa's family. The land he bought from Lelaa's family was sold to him by 3 members of the family. That Lomuguli @Oinoti sold him 16 acres and Simon sold to him another 16 acres. According to DW3, the land sold to him is the source of this case. When cross examined, DW3 stated that he did not tender any sale agreement as they did not write any since they trusted each other. He also stated that DW1 got the land from his father. The three Defendants also denied to have been sued in the District Land and Housing Tribunal. They also denied to have trespassed into the Plaintiff's land.

The Defendants summoned DW4 who testified that he lives at Meserani Juu village and was a member of Village Council from 1989 to 1999. He disputed exhibit P1 which shows that he participated in the Village Council meeting of 1988, stating that by that time he was not yet a member of the Village Council. He insisted that he had been living in that village for a long time, but he had never heard that the Village Council participated in a meeting to straighten the Plaintiff's boundaries. The other witness was DW5, the elder brother of the Plaintiff and DW1. He testified that it was not true that his father gave the farm measuring over 100 acres to the Plaintiff, because at that time the Plaintiff was only about 15 years. He admitted that administration of the estate of their father was given to DW1, who was appointed by the whole family. DW5 admitted that there was a case in the District Land and Housing Tribunal which was later brought home for reconciliation. That reconciliation failed because the Plaintiff refused reconciliation. DW5 also admitted that the 3rd Defendant bought land at their farm which was sold to him by the whole family. When cross examined, DW5 could not remember when the farm was distributed, but that the same was divided through a family meeting, and the Plaintiff participated. He also confirmed that in the distribution each one got 16 acres, and some of those

who were given the land sold it to the 3rd Defendant. This evidence was supported by that of DW6, who is also a brother to the 1st Defendant and the Plaintiff'. DW6 stated that the farm was not given to the Plaintiff by their father. He disputed exhibit P2 as the family was not involved. He admitted that the land that he was given during the distribution, he sold the same to the 3rd Defendant.

4. 0 ISSUES

The following issues for determination were framed:

a) *Whether the Plaintiff is the owner of the land in dispute;*
b) *Whether the 2nd and 3rd Defendants are trespassers to the suit land; and*
c) *To what reliefs are the parties entitled to.*

In attempt to prove the above issues, the Plaintiff summoned three witnesses; namely, Kilamian Lelaa (PW1), Michael Meesani (PW2) and Wapi Lesiwani (PW3). Three exhibits were tendered; namely, a letter from Meserani Village Office allowing the Plaintiff to put borders on his farm dated 30/11/1988 (Exhibit P1), a letter from Meserani Village Office showing that the Plaintiff owned the suit land dated 6/7/2017 (Exhibit P2) and Valuation Report of the suit land dated 10/8/2018, (Exhibit P3).

The Defendants summoned six witnesses; namely, Ndoika Lelaa (DW1), Kalakai Saigurani (DW2), Kuresoi Lenaisiwani (DW3), Sakaine Lelesiguan (DW4), Lenjala Lelaa (DW5) and Simon Lelaa (DW6). One exhibit was tendered by the Defendants which is form No. 4 from Monduli Primary Court dated 2/10/2017 that appointed the 1st Defendants as the administrator of the Estate of the late Lelaa Seneu.

4.1 Is the Plaintiff the owner of the land in dispute?

In an attempt to prove this issue in his favour, the Plaintiff stated that the suit land was allocated to him by his father way back in 1979 and he started owning it in 1980. The documents brought in Court to prove his ownership are two letters from the Village Office showing that the village blessed the allocation and the valuation report. His witnesses, PW2 and PW3 confirmed that the land belonged to the Plaintiff as the same was given to him by his late father. In her final submission, Ms Mndeme urged the Court to enter judgment on admission due to the fact that the Defendants in their WSD denied evasively that they never disturbed the land in dispute, which in Ms Mndeme's view amounts to admission that the suit land belongs to the Plaintiff. To support her contention, she referred to the case of ***Beday Mgaya t/a Befca Technical and Supplies Vs. the Attorney General and two Others***, Civil Case No. 112 of 2019 (unreported). She faulted exhibit D1, stating that the appointment of the 1st Defendant as the administrator of the deceased's estate was made after the Plaintiff had sued the Defendants in the District Land and Housing Tribunal vide Application No. 20 of 2012 on the same cause of action. She termed exhibit D1 as a forgery for facilitating the Defendants' intention of depriving him his land. She was of the view that the Plaintiff managed to prove his case on the balance of preponderance. She cited the case of ***Daniel Appeal Urio Vs. Exim (T) Bank***, Civil Appeal No. 185 of 2019 (unreported), urging the Court to declare the Plaintiff the awful owner of the suit land and grant all the reliefs prayed in the plaint.

The Defendants denied trespassing into the Plaintiff's land. The 1st Defendant brought proof that he was appointed the administrator of Lelaa Seneu's estate. That evidence was supported by the defence witnesses including DW5 and DW6 who are blood brothers to the Plaintiff and the 1st Defendant. In his submissions, Mr. Minja faulted the evidence of the Prosecution stating that it has failed to prove the Plaintiff's ownership over the suit land. He made

reference to section 110(1) of the Evidence Act, Cap. 6 [R.E 2019] which requires any party who alleges existence of a certain fact to prove its existence. Mr. Minja further faulted the exhibits tendered by the Plaintiff stating that they cannot amount to proof of the Plaintiff's ownership of the suit land.

I have weighed the evidence of both sides as well as the submissions made by respective counsel. This is a feud of family members attributed to inheritance. Other than the oral testimony made by the Plaintiff and his witnesses, no documentary evidence was submitted to prove how the land was given to the Plaintiff from his father. However, unlike the Defendants, he was able to produce written evidence to support his entitlement over the piece of land he claims. Exhibit P1 show that the allocation was blessed by the Village Assembly. Although the document is not signed by any of the members whose names appear as attendees, there is no evidence to prove that the same was not from a genuine Village Assembly meeting. It is a typed record of the original, in my view.

Further, the size of land that the Village assembly confirmed so that the Plaintiff puts demarcations as shown in exhibit P1 is almost the same as the one he claims in his evidence. In his evidence, PW1 claims that his land measured 87.3 acres. In Exhibit P1 the land that he was allowed to stall demarcations measures 800 × 480 footsteps which when converted measures almost the same number of acreages. It was in evidence that the Plaintiff's father had many other children. There is evidence that he left land to each of his children. This can be seen from the evidence of DW5 who stated that his land was outside the suit land. Further DW1's evidence that the Plaintiff was given a bigger piece because he is stubborn makes no empirical sense. As the Administrator of the estate, he could not be dictates by the wishes of one of the heirs but the authority given to him by the family meeting. It is also in evidence that the pieces of land apportioned were later sold to DW4. DW4 did not have any documentary proof

of the land he says he bought. The arithmetic of the number of acres he bought also leaves a lot of question. It is against those circumstances that I feel compelled to agree with the Plaintiff that the purported administration by the 1st Defendant was anticipatory of the claims by the Plaintiff. Although the all the Defendants, quite surprisingly, denied existence of Application No. 20 of 2012 filed in the District Land and Housing Tribunal for Arusha, their own witness (DW5) confirmed that there was a similar suit filed by the Plaintiff which was later agreed to be settled by the family. Although it was the duty of the Plaintiff to submit proof thereof, the denial made by the Defendants raises a credibility issue on their part.

Having said so, it is the finding of this Court that the Plaintiff managed to prove his ownership over the suit land. The first issue is resolved in the affirmative.

4.2 Are the 2nd and 3rd Defendants trespassers to the suit land?

According to the Plaintiff, the 1st Defendant colluded with the 2nd Defendant, who is a middleman, and sold it to the 3rd Defendant. The Defendants did not deny the fact that the 3rd Defendant bought 16 acres of land from the 1st Defendant. In their evidence, they stated that the 1st Defendant sold the suit land to the 3rd Defendant as part of his inheritance from their father's land.

Having heard the evidence and considered the exhibits tendered, I have not been able to see tangible evidence to support the assertion that the 2nd Defendant trespassed into the suit land. There is no evidence that shows how the 2nd Defendant participated in the selling of the suit land. Even if, for argument's sake, the 2nd Defendant was a middle man in the sale of part of the suit land to the 3rd Defendant, that does not make him a trespasser to the suit land. To prove his culpability for trespass, evidence should have shown that he is physically present in the suit land. In his testimony about this issue, the Plaintiff had this to say:

"The 3rd Defendant is the one my brother sold the farm to. The second Defendant is dalali. He conspired with the 1st Defendant to sell my land. I live in the same farm. I knew that my farm had been trespassed into when the Defendants started cultivating in the farm and cut some trees. They cultivated about 4 acres. They cultivated behind and in front of my house. I reported at the village office about the trespass."

From the above, one cannot safely conclude that the 2nd Defendant trespassed into the suit land. However, there is cogent evidence to prove that the 3rd Defendant bought part of the suit land. As the 1st Defendant had no right over the piece of land sold, I have no hesitation to conclude that the 3rd Defendant's entry into the suit land and his continued presence therein constitutes trespass. One may be tempted to argue that the 3rd Defendant is an innocent purchaser, having bought the said piece of land from the 1st Defendant. According to law, if the 3rd Defendant was an innocent purchaser, the Court would be reluctant to interfere with his ownership. The Court of Appeal in the case of ***Stanley Kalama Masiki Vs. Chihiyo Kuisia w/o Nderingo Ngomuo*** [1981] TLR 143. In that case, at page 144, held that:

"Where an innocent purchaser for value has gone into occupation and effected substantial development on land the courts should be slow to disturb such a purchaser and would desist from reviving stale claims."

In the case at hand, the 3rd Defendant does not fall in the category of a *bonafide* purchaser of the land. As stated above, the land purportedly sold to him was sold by someone who did not have title to it. The 3rd Defendant, being a resident of the area, is presumed to know who the legal owner of the said land is. Further, the fact that he participated in assaulting the Plaintiff to forcefully remove him from the said land, made his cattle to enter the land and cultivated around the houses occupied by the Plaintiff, militate against his innocence. Further, the 3rd Defendant confirmed in Court that he did not have any documentation to support his assertion that he bought the said land legally. He did not attempt to bring any village leader who would have confirmed that the

alleged sale had the blessing of the village. During cross examination, the 3rd Defendant appear to have concocted a self-blame when he stated:

> *"I have not tendered any sale agreement as we did not write.* ***I acted foolishly as I should have written.*** *We normally trust each other. In that village we rarely write."*

Before the 3rd Defendant made the above assertions, he informed the Court that he could not remember when he bought the pieces of land from Lelaa's family. His testimony in Court appeared very suspect. He even denied having been a defendant in a previous case involving the same parties. I therefore have no hesitation to conclude that the 3rd Defendant is a trespasser in the suit land. Having so held, if he feels that he was conned, the 3rd Defendant is at liberty to claim against the 1st Defendant for a refund of the money he paid for the illegal purchase of the suit land. The second issue is partly resolved in the affirmative with regard to the 3rd Defendant and in the negative in relation to the 2nd Defendant.

4.3 To what reliefs are the parties entitled to?

In addition to the declaration of ownership of the suit land and trespass, the Plaintiff also asked the Court to grant him general damages as the Court deems appropriate. In the final submissions, Ms. Mndeme did not attempt to amplify circumstances which the Court should consider to award such damages. In his testimony in Court, the Plaintiff stated that he was assaulted and that the 3rd Defendant caused his cattle to enter into his farm. He therefore asked for compensation thereof. It is trite law that in awarding general damages, the quantification of such damages remains in the discretion of the court. The Court of Appeal in the case of ***Peter Joseph Kibilika and Another Vs. Patrick Alloyce Mlingi,*** Civil Appeal No. 37 of 2009 (unreported), where it was held:

> *"It is the function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of* ***Admiralty Commissioners v SS Susqehanna*** *[1950] 1 ALL ER 392.* ***If the damage be general, then it must be averred that such***

damage has been suffered, but the quantification of such damage is a jury question. "(Emphasis added)

From the evidence and the pleadings, trespass into the Plaintiff's land started in 2012. The same has persisted for about 9 years. It is not in dispute that within that time the Plaintiff has not been able to utilize his land as he would have done had the trespass not occurred. Considering all the circumstances, the Court assesses his damages at TZS 18,000,000/= (say Eighteen million shillings) only. The 1st and 3rd Defendants share equal blame to this damage.

The Plaintiff asked that such damages be subject to a 7% interest from the time of filing the suit to the time of payment in full. This claim is untenable. Interest on general damages attracts interest from the time it is assessed. It cannot be retroactive as would be special damages.

5.0 CONCLUSION

From what I have endeavored to discuss above, the suit against the Defendants has merits. The Plaintiff has on the preponderance of evidence proved his case. The Plaintiff is hereby declared the lawful owner of the suit land. The 3rd Defendant is declared a trespasser. He should give vacant possession forthwith. The Plaintiff has not proved claims of trespass against the 2nd Defendant. The 1st and 3rd Defendants shall pay the Plaintiff TZS 18,000,000/= as general damages arising out of trespass to the Plaintiff's land. This amount shall be equally shared by the two. The said general damages shall be subject to interest at the Court's rate from the time of this order until payment in full. The 1st and 3rd Defendants shall also pay costs of this suit to the Plaintiff.

Order accordingly.

Y. B. Masara
JUDGE
22nd October, 2021