IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND CASE NO. 7 OF 2021

YOHANA MELITA .....1ST PLAINTIFF

EMANUEL HAIYO .....2ND PLAINTIFF

SOINGEI HAIYO .....3RD PLAINTIFF

SHAUSHI OMING'ANY .....4TH PLAINTIFF

TUBULU HAIYO .....5TH PLAINTIFF

SHILALO OMINGANY .....6TH PLAINTIFF

ONING'OI OLAINGUNYA .....7TH PLAINTIFF

SARUNI NGIBIOTO .....8TH PLAINTIFF

MUKEYO LEYANA .....9TH PLAINTIFF

MASIKIO LEYANA .....10TH PLAINTIFF

PAULO OLOPUKEI .....11TH PLAINTIFF

KIMANI OLOPUKEI .....12TH PLAINTIFF

KONE TETO .....13TH PLAINTIFF

SITONIKI OMING'ANY .....14TH PLAINTIFF

ZAKAYO LEYANA .....15TH PLAINTIFF

NGOYE LEYANA .....16TH PLAINTIFF

MARIO LENDINDU .....17TH PLAINTIFF

BARAKA LEBUZI .....18 PLAINTIFF

ISAYA LEBUZI .....19TH PLAINTIFF

VERSUS

TERRAT VILLAGE COUNCIL.....1ST DEFENDANT

THE DISTRICT EXECUTIVE DIRECTOR OF

SIMANJIRO DISTRICT COUNCIL .....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

14/03/2023 &03/05/2023

GWAE, J

The plaintiffs named herein above are currently the residents of Nadonjukin Village-Terrat Ward within Simanjiro District save 17th, 18th, and 19th plaintiffs herein who are residents of Sukuro Village. However, prior to the establishment of the said Nandonjuki Village, the plaintiffs were residents of Komolo village (mother village) and Nandonjuki by then was a hamlet within Komolo Village.

Through the plaint duly admitted on 28th April 2021 by the court, the plaintiffs who are farmers and pastoralists allege to have been deprived of their respective pieces of land measuring 1346 acres (suit land) and their valuable properties such as grains (beans and maize) and the like were damaged from their houses. As the 1st defendant was claiming ownership over the suit land, she initially sued Komolo Village Council in the Resident Magistrate Court of Arusha through Civil Case No. 54 of 2002 which was however dismissed in 2005.

Subsequent to the dismissal of the 1st defendant's suit by RM's Court, on 3rd November 2020 the 1st defendant issued eviction notices to the nineteen (19) plaintiffs herein and that, on the 1st day of December 2020 the eviction exercise was carried out and six persons including 13th

plaintiff (PW12)were arrested, charged and prosecuted. Following the 1st defendant's act of evicting the villagers including the plaintiffs alleged to have trespassed the livestock pastureland (suit land), the plaintiffs reacted by instituting this civil suit against the 1st defendant, Terrat Village Council, Simanjiro District Council and Attorney General (hereinafter to be referred to as 1st, 2nd and 3rd defendant respectively). They are now praying for the judgment and decree against the 1st defendant as follows;

1. Declaration that, the plaintiff are the lawful sow of the suit land and they should re-occupy their land
2. Declaration that destruction of the plaintiffs' houses and eviction from the suit land was unlawful
3. An order to the 1st defendant to pay general damages to the plaintiffs for the loss of home and assets suffered by the plaintiffs
4. Costs of this suit
5. Any other relief (s) as this court shall deem fit and just to grant

Upon service of copies of the plaintiffs' plaint, the defendants jointly filed their written statement of defence whereby refuted that the plaintiffs were lawfully allocated the parcels of land in dispute since the suit land was owned by the 1st defendant and not Komolo Village Council. That, there was a resolution meeting held on 20th day of February 2020 by the

1st defendant and other neighboring villages including the plaintiffs' villages where it was mutually agreed that, the trespassers of the suit land should voluntarily vacate. The defendants further stated that, the 1st defendant procedurally evicted the plaintiffs from the suit land after expiry of the 14 days' notice issued to them.

The defendants further denied liability by stating that, the 1st defendant never destroyed the plaintiffs' properties including houses since the plaintiff have their own permanent houses in Nandonjukin village. The defendants finally sought an order of the court dismissing the plaintiffs' suit.

Order VIII D Rule 40 (1) of the Civil Procedure Code, Cap 33 Revised Edition, 2019 (CPC) was complied and the following issues were framed immediately before commencement of trial;

1. Whether the suit land is located at Terrat Village (1st defendant)
2. Whether the plaintiffs are the lawful owners of the suit land
3. Whether the eviction by the 1st defendant was lawful and procedural
4. To what reliefs are the parties entitled to

In proving the case, the plaintiffs summoned twenty (20) witnesses that is to say the 19 plaintiffs and their sole witness one **Sailepu Siminde**

(PW15) a resident of Komolo Village who was the Komolo village chairperson from 1993 to 1999. Most of the plaintiffs testified to the effect that, Komolo village authority allocated 56 acres to them. These are (6th, 11th, 15th, 16th, 17th and 19th plaintiffs); other plaintiffs testified that, they were given 90 acres (1st, 3rd and 18th plaintiffs) and other sizes like 50 acres (PW2 and PW7 who are 3rd and 5th plaintiff herein), 80 acres (13th and 14th defendants).

However, the PW15 testified that, each applicant now plaintiff was allocated 56 acres by Komolo Village Authority. All the plaintiffs in essence testified that, the 1st defendant wrongly and unjustifiably burnt their houses which were in the suit land before demolition/eviction and that, there were grains and other properties that, were damaged by the 1st defendant.

In furtherance of their proof, the plaintiffs also tendered the following exhibits; criminal proceedings in respect of Criminal Case No. 102 of 2020 in the District Court of Simajiro at Orkesumet between the Republic and one Kone s/o Teto (13th plaintiff) and five others (PE1). Another exhibit is the judgment of this Court vide Criminal Appeal No. 144 of 2021 where the parties were; Kone and others (appellants) who were convicted by the trial court of the offence disobedience of lawful order c/s

124 of the Penal Code, Cap 16 Revised Edition, 2019 and the Republic in which the trial court's decision was reversed. There is also a certificate handing a parcel of land to the 18th plaintiff (PW18) that was produced and received as PE3 as well as a statutory notice of ninety (90) days to the defendants

The defence, when afforded an opportunity to defend summoned its four witnesses. These are; Kone Pendeti, a current Komolo village chairperson, (DW1), Godson Nduya, a retired Komolo village Chairperson from 2014 to 2019 (DW2), Mathayo Butare, a Nadonjukin village chairperson from 2019 to date (DW3) and Elia Kilusu Thumuni, a Sukuro Village Chairperson (COORDINATES) from 2019 to date. The evidence by defence witnesses herein is in essence establishing that the suit land is located within Terrat Village (1st defendant) established since 1976 and that there was a dispute among the following villages, Komolo, Sukuro and Terrat Village. The defendants' witnesses also testified that the dispute was referred to Divisional officer and the same was resolved by directive that the trespassers of the suit land should vacate from the suit land so that the same would be used by the said villages for grazing of livestock.

The defendants witnesses also testified that the plaintiffs were not lawfully allocated the suit land and that, after identification of the suit trespassers, there was issuance of eviction notice dated 3rd November 2020 of 14 days. The defence through DW1 went on testifying that, the plaintiffs voluntarily vacated the suit land except those six persons who were arrested on the material date (2nd December 2020) and they were prosecuted.

Defence further denied to have caused any damage or destruction and stated further that, the huts alleged to have been destroyed were none other than mere sheds thatched with grasses commonly known as Ronjoo.

In support of its oral evidence, the defence produced the following exhibits, Terrat Village certificate of registration issued on 1st April 1976 (DE1), Customary Right of Occupancy issued 19th December 2018 for the 1st defendant. Other documents are minute sheet of the meeting held on 8th February 2020 by neighboring villages (Sukuro, Nadonjukin and Terrat Village) under the leadership of Divisional Officer (DWE3). Among the issues deliberated through DE3 were; invaders of pastureland and the persons built their houses in another village should not be distressed provided that, they adhere to by-law of a respective village. Furthermore,

there was a letter from the office of Simanjiro District Commissioner dated 2nd day of November 2020 directing Village Executive Officers of Terrat and Ndonjukin village to ensure those encroached to grassland were evicted (DE4).

Other documents tendered by the defence is Certificate of Title of the 1st defendant issued on 8th April 2020 (DE5) indicative that, the size of the Terrat Village 23,948.2 and 19 eviction notices addressed to each plaintiffs (DE6).

After close of the parties' case, the court made a visit of suit land and there were court's observations such as a private "well" erected within the suit land, the suit land is currently used for grazing only by pastoralist of all villages surrounding it. The great part of the suit land is dark soil /grassland (mbuga) commonly known as Ngusero. There were signs of remains of the demolished houses and cleared forest indicative that the land was being used for cultivation especially the land occupied by the PW1 (1st plaintiff and 13th plaintiff). The parties' advocates also sought and obtained leave to file their respective closing submission. I shall however reproduce it but I shall consider the same as a guidance toward my composing of this judgment.

Having briefly summarized the parties' evidence, it is now the noble duty of the court to determine issues framed as herein under;

The 1st issue, whether the suit land is located at Terrat Village (1st defendant).

Considering the evidence adduced by the defendants through DW1 to DW4, it goes without saying that, the suit land is located at Terrat Village though adjacent to southern part of Nadonjukin Village. This fact is more demonstrated by the so called "Hati ya Kumiliki ya Kimila" (DE2) issued by Authorized Land Officer (Baltazai Sulle) on 19th December 2018 and Village Land Certificate issued on 8th April 2020 (DE5).

These two documents clearly establish that, the suit land is located at Terrat Village and not at Nadonjukin Village. This fact was also self-explanatory when the suit land was visited by the court. According to the plaintiffs' evidence that, they were allocated by Komolo Village Authority does not in itself suffice to warrant this court to hold that, the suit land is the belonging of Komolo Village. It is well established principle that, who alleges has a burden of proof in terms of section 110 of Tanzania Evidence Act, Cap 6 Revised Edition, 2019. (See also the Case **Siraj Din vs. Ali Mohamed Khan** [1957] 1 EA 25 **and Agatha Mshote vs. Edson Emmanuel and 10 others**, Civil Appeal No. 121 of 2019 (unreported-CAT)).The 1st issues is therefore answered in affirmative.

In the 2nd issue on whether the plaintiffs are the lawful owners of the suit land.

The plaintiffs' evidence that, the suit land was the property of Nadonjukin hamlet by then that is why they were allocated by Komolo Village is unfounded since it is not even supported by DW3, a current Nadonjukin Village chairperson. DW3 clearly stated that, the suit land belongs to the 1st defendant and that it was designed for grazing by 1st defendant. How can it be possible for the chairperson to be ready or willing to have a portion or part his village land confiscated by another village? The answer is negative.

Even those plaintiffs who testified to have been allocated by Sukuro Village, they cannot be said to have lawful been owners since the village that allocated the same have no good title to pass to them. It is general principle that a person who does not have legal title to land cannot pass good title thereto over the same to another person. It is worthwhile to join hand with my learned sister, **Makani, J** in her judgment in **Abdallah Said Masoud vs. Gharib Suleiman and five others**, Land Case No. 398 of 2016 (unreported) who stated;

> *In the present case, the alleged sale of the suit property was between Christopher B. Nyati and the plaintiff, and as established hereinabove, Christopher B. Nyati did not*

have a good title so he could not have passed titled to the plaintiff because a person without good title to the property cannot pass a title to the transferee".

(See also **Farah Mohamed vs. Fatuma Abdallah** (1992) TLR 205 and **Mamujee Bros Ltd vs Awadh** (1969) 1 EA 520). Hence, neither Komolo village nor Sukuro Village would allocate the pieces of land, which did not belong to them, to the plaintiffs except the 1st defendant who is the lawful owner. It must also be known in advance that, a village council may allocate a parcel of land to any person notwithstanding such person is a resident of that village where he or she applied for allocation or not, provided that he or she has followed necessary procedure and is a citizen of the United Republic of Tanzania.

A question that follows is, whether the plaintiff can legally take an advantage of the doctrine of adverse possession as they are alleging to have been allocated by either Komolo Village or Sukuro between 1993 and 1999 while the dispute arose. This piece of the plaintiffs' evidence is mainly supported by their oral evidence and one documentary evidence tendered by 18th plaintiff (PE3). I am holding so simply because none of the plaintiffs had produced any documents relating to the alleged allocation save the 18th plaintiff.

It is pertinent to note that, annextures appended to a plaint are not documents reliable by the court to form basis of a decision. In our instant case, most of the plaintiffs when cross-examined as to whether they have tendered necessary document to support the assertions that they were allocated by the said villages, they merely replied that, they have attached the allocation letters to their plaint. The attachments in the plaintiffs' plaint are not documents to be relied unless documents in lieu thereof are produced. The Court of Appeal stressed this position of law in **Godbless J. Lema v. Mussa Mussa Hamis Mkhanga and two others**, Civil Appeal No. 47 of 2012, with approval of its decision in **Sabry Hafidhi Khalfn vs. Zanzibar Teleco. Ltd (ZANTEL),** Civil Appeal No. 47 of 2009 (unreported) where it was stated;

> *"But in our case there is no evidence on the record to indicate that the respondents were registered voters. The record contains annextures. It is trite law that the annextures are not evidence for the court of law to act and rely upon".*

Taking the fact that, the plaintiffs have amply testified that, they were in the suit land since 1993 while the dispute arose 2020 against the plaintiffs however through the parties' pleadings (See paragraph 8 of the plaintiffs' plaint as well as paragraph 5 of the defendant's joint amended

written statement of defence. These paragraphs are indicative that, there had vividly been a dispute over the suit land between the 1st defendant and Komolo since 2002 entailing that the 1st defendant did not sleep over her rights. The plaintiffs or their counsel cannot therefore depart from their own pleadings. I subscribe my stance with the decision of the Court of Appeal in **Charles Richard t/a Building vs. Evani Mtungi and 2 others**, Civil Appeal No. 38 of 2012 (unreported) where it was stated;

> *"It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted that defence ought not to have been accorded any weight".*

The plaintiffs' assertion through their closing submission that their have adversely remained in possession for more than 12 years. Hence, the doctrine of adverse possession wrongly sought by the plaintiffs to form basis of the decision in their favour is not applicable since the doctrine of exclusion is applicable as per item 22 Part 1 to the schedule of the Law of Limitation Act, Cap 89 Revised Edition, 2019 (Act).

I am alive of the principle that, the doctrine of adverse possession provides that an owner of land may lose the title to his land if he fails to eject or evict trespassers promptly. If the trespasser uses the land as his own for the length of time specified in the state's statute of limitations. It follows that, the owner is barred from recovering possession of the land from the trespasser.

However, I am not influenced if the doctrine of adverse possession can operate against the 1st defendant vested with all executive powers as provided for under section 142 (1) of the Local government (District Authority) Act, Cap 287, Revised Edition, 2002 like those of the Central Government. The principle of adverse of possession cannot be rightly invoked against the Government including local government. I am thus persuaded by the American jurisprudence in **Fischer vs. City of Sauk Rapids,** 325 N.W2d 816, 818 (Minn. 1982), it was held that, adverse possession against the government is not allowed or the land owned by the Central or Local Government are immune from adverse possession. Under section 38 of the Laws of Limitation, (supra) the public land is and it should indeed be protected from adverse possession. It is perhaps pertinent to have provisions of section 38 of the Act reproduced herein under so that the same may speak on themselves;

"38. Notwithstanding anything contained in this Act-

(a) No person shall become entitled to an estate or interest in any public land by adverse possession;

(b) any estate or interest acquired in any land other than public land by adverse possession or by reason of any law of prescription shall expire upon the expiry, revocation or determination of the right of occupancy under which the land is held, or where the land was not held under a right of occupancy, upon the reversion of such land to the President;

(c) No suit or other proceeding by or on behalf of the President or the Government of the United Republic for the recovery of land shall be dismissed on the ground that the period of limitation has expired".

According to the above provisions of the law, no person may be entitled to any estate or interest over a public land by virtue of adverse possession and that, the Government is not precluded from instituting a case relating recovery of its land based on limitation of time. In view of the above position of the law, the plaintiffs' assertions followed by their closing submission are baseless in this regard. The 2nd issue is therefore not determined in favour of the plaintiffs.

As to the 3rd issue, whether the eviction by the 1st defendant was lawful and procedural

It is the version by the plaintiffs that the eviction was unlawful and unprocedural since they had their valuable goods in the dwelling houses whereas the defendants are contending that there were issuance of 14 days eviction and that, after lapse of 14 days many trespassers have evacuated except six years.

The 19 notices of eviction issued by the 1st defendant on the 21st day of February 2020 (DE6) to the plaintiffs was with effect that each plaintiff was to vacate from the suit land from the suit land, land reserved for grazing within seven (7) days from the date of service the notice. For clarity, paragraph 3 of the letter is reproduced herein under;

> *"Hivyo kwa barua hii unapewa siku saba (7) tangu tarehe ya barua hii. Aidha endapo kama haujandoka hatua za kisheria zitatumika."*

In view of the defendants' testimonies, judicial proceedings in respect of Criminal Case No. 102 of 2020 against 13th plaintiff and five others (PE1) and judgment of this court on its appellate jurisdiction via Criminal Appeal No. 144 of 2021(PE). According to PE1, suit land trespassers were ordered to vacate from the suit land however, 19 persons now plaintiffs did not vacate on their own accord. In these premises, the plaintiffs were certainly evicted by the 1st defendants

following the order of the District Commissioner and the 19 notices issued against the plaintiffs.

That being the case, it is now the duty of the court to ascertain whether the eviction order was lawful and procedural. Considering the wording of the eviction notices (DE6), if a trespasser did not vacate from the suit land, the 1st defendant was to take necessary legal action (s) against those who failed to voluntarily vacate. More so, the District Commission has administrative powers to mediate or give directives but whenever there are persons, who are not willing or ready to obey such directives or orders especially where there is a land dispute, the proper way was to institute a land dispute before land Dispute machinery competent to deal with the matter.

Proof of existence of meeting (DE3) among disputants or letter from the office of the District Commissioner directing those in the suit land to vacate from therein (DE4) or issuance of notices (DE6), in my considered view, does not justify the 1st defendant's eviction. I am of that increasing view since the plaintiffs had their claims on ownership of the suit land. The appropriate way was that, the 1st defendant ought to observe a rule of law by instituting a land case against those persons who

were not ready to comply with the administrative orders. Rule of law provides for foundation and stability of given society.

Our courts or quasi-judicial bodies are like a woman who is perceived to be weak physically, but her moral and intellectual strength provide the foundation for stability and prosperity of society. The 1st defendant and 2nd defendant were to respect rule of law instead of being directives or orders makers and at the same decision makers. The rights of citizens are to be properly regulated and in case of non-compliance of order or directive, proper procedures ought to have been adhered to. In **Republic v Gachoka and another** (1999) 1 EA 254 it was stated;

> *"I have no apology in doing so, for the reason that if we are to remain a free society under the law, with a free press, we all, without exception, must continue to uphold the principle of the rule of law and if it is necessary to continue to uphold that principle, then we must also continue to maintain the institutions that go with it".*

In instant case, there is no aorta that, the plaintiffs did not comply with the directives of the DC and notices issued to them yet that alone did not exempt the administrators from upholding the rule of law by taking necessary legal steps instead of forcibly evicting the plaintiffs and their families. Therefore, the plaintiffs were unlawfully and unprocedurally

evicted from the suit land since no lawful order that was issued by an authorized body against the plaintiffs.

Lastly, the reliefs that the parties are entitled

Since I have found herein that, the plaintiffs were not allocated by the legal entity with title to pass, therefore they are not entitled to the ownership of the suit land. The suit land is therefore the property of the 1st defendant. However, the plaintiffs' eviction by the 1st defendant was unlawful and that being the finding of the court they are therefore entitled to general damages to be assessed by the court. However, the plaintiffs asserted that, there were grains in their residential huts that were destroyed and other valuable but no tangible evidence to support such assertions. Nevertheless, there is credible evidence that, the plaintiffs' huts or ronjoo in the suit land were demolished (See evictions addressed to each plaintiff-DE6). Thus, at least there are properties that were damaged and that, the plaintiffs must have sustained consequential impacts of the eviction. In **Tanzania Saruji Corporation vs. African Marble Co Ltd** [2002] 2 EA 613, the Court of Appeal of Tanzania stated inter alia that;

> *"General damages are such as the law will presume to direct, natural or probable consequence of the act complained of."*

In our instant suit, the plaintiffs must have sustained negative consequences of the complained eviction. Therefore, they are entitled to general damages at the sum of money, which will put them in the same position they were before.

Since the matter is partly decided in favour of the plaintiffs and partly in favour of the 1st defendant, each party shall bear the costs of this suit.

Consequently, I hereby make the following orders;

1. The 1st defendant is declared the lawful owner of the suit land
2. The eviction of the plaintiffs from the suit land is declared unlawful and procedural
3. Following the unlawful and unprocedural eviction by the 1st defendant, the plaintiffs are entitled to general damages, each plaintiff is entitled to Tshs. 2,500,000/= making a total of Tshs. 47,500,000/=
4. Each party shall bear the costs of this case

It is so ordered.

DATED and **DELIVERED** at **ARUSHA** this 3rd May 2023

M.R. GWAE,
JUDGE

Court: Judgment delivered this 3rd May 2023 in the presence of Mr. Mkama, the learned state attorney for all defendants also holding brief of Mr. Njau for the plaintiffs, 13thplaintiff,. Copies of Judgment, decrees and proceedings and drawn order are collectable by today

M.R. GWAE,
JUDGE