THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND CASE NO. 08 OF 2022

ABULLATIF KAIDI SHARAF..... 1ST PLAITIFF

SHARAFF QAED SHARAF..... 2ND PLAINTIFF

VERSUS

BAHATI MOLOMA & 30 OTHERS..... DEFENDANTS

JUDGEMENT

Hearing date on: 05/06/2023
Judgement date on: 27/06/2023

NGWEMBE, J.

This land case was instituted on 29th March, 2022 before this house of justice by two brothers, Abullatif Kaidi Sharaf and Sharaf Qaed Sharaf, being the first and second plaintiff respectively. The land in dispute is part of 515 acres in Farm No. 177, bearing title deed No. 38788, L.O 137754 located at Kungurumuoga, Kidogobasi Village, Kilosa District herein Morogoro region.

According to the claim, the land described above was owned by the late Kaidi Sharraf, a father to the plaintiffs. The deceased acquired that land by clearing virgin land and establishing paddy and cane field. It is averred in the plaint that the deceased incorporated a company by the name of KIDOGOBASI SUGAR CANE ESTATE LTD and the land was later

registered in the name of that company to which the first plaintiff was a surviving shareholder.

The first Plaintiff (Mr. Abdullatiff) is an administrator of the estate of their late father. The land was transferred to him being a surviving shareholder. The second plaintiff joined the first plaintiff and they have been jointly using the land for paddy and sugarcane plantations.

The cause of action disclosed by the plaintiffs in the plaint goes back to year 2013 on diverse dates and time, the defendants invaded the suit land by destroying part of the boundaries of the farm and encroached the land by destroying sugarcane, digging trenches, big pits, making bricks and cultivation of seasonal crops. Efforts to stop them from encroaching were made, but in vain. Therefore, the plaintiffs are praying before this court for the following reliefs: -

1) 1st plaintiff be declared the lawful owner of the whole land measured 515 acres situated on area with Title Number 38788, L.O No. 137754 and the 2nd plaintiff be declared a lawful user.
2) Eviction order be issued against all defendants
3) Defendants be ordered to pay Tshs. 50,000,000/= as a general damage
4) Costs of this case be paid by the defendants.

In turn the defendants likewise, filed their pleadings denying each and every fact raised by the plaintiffs. Thus, called for hearing after failure of mediation. In this dispute both parties were represented by learned counsels, while the plaintiffs were represented by Mr. Jackson Liwewa, the defendants had the good services of Messrs. Benard Chuwa and Nimrod Msemwa. As already said, mediation was not feasible in this case, it seems parties failed to have meeting point towards amicable settlement.

Therefore, they resorted to full litigation. On 01/12/2022 issues for determination during trial were collectively agreed to as follows: -

1) Whether the defendants are trespassers to the plaintiffs' land; and

2) What reliefs are the parties entitled to.

The law demand that the plaintiffs should be given the first chance to prove their case against the defendants. The first plaintiff, testified that, his main business is sugarcane production. The farm with title deed No. 38788 is his property issued to him in year 1991 for 33 years. He tendered the title deed as exhibit P1. After having read it loudly, he described the boundaries by listing beacons to the conners of his farm. Testified further that, on 27/11/2020 the farm was transferred from Kidogobasi Sugar Estate to his names Abdullatif Kaidi Sharaff.

Explained about the wrongful act of the defendants that, they trespassed in year 2013 and proceeded to conduct farming and brickmaking activities therein. He reported to the village authority, later on they filed a case to the district land tribunal, which he claimed the tribunal paid a visit in *locus in quo* and verified the boundaries and opined that, the defendants were trespassers. The defendants about 30 of them, surrounding the land in dispute on the East and West side trespassed his land. However, the land dispute at the tribunal was withdrawn on the ground of pecuniary jurisdiction.

In cross examination, he admitted the trespassed area is not disclosed. Also admitted that the trespassers are his neighbours, beacons are physically seen and easily identifiable with about two meters height from the surface. He was not there when the beacons were uprooted. He confirmed to know Peter Kitale and that he is his neighbour and when he

purchased his land, **PW1** was the witness, but he was not around when the boundaries were located to him. In further cross examination, he added that he did not know the extent of the land trespassed, even the district tribunal did not manage to verify the boundaries due to chaos and violence from the trespassers and neighbours.

PW2 Harid Mponda Hassan, a surveyor of Kilosa district council testified that in 2019, the district council required him to go at the disputed Farm No. 177 to interpret the map along with the land tribunal. He went and accordingly interpreted the map and found that on the west there were many trespassers over 22 acres, beacons were displaced. On the East side were few trespassers. He furnished the report to the district council.

PW3 Sharaff Qaed Sharaff, the second plaintiff testified also on affirmation. He stated that, his main activity is sugarcane cultivation which he conducts in the disputed land. On trespass, he testified same way as PW1. In cross examination, he stated that he is aware that the owner is the first plaintiff, but he has usufructuary interest in that land and they are relatives. That the beacons were placed after the land was transferred to his brother, the first plaintiff. In using the land, they were leaving about 20 meters from the boundaries. Thus, concluded by a prayer that the suit be decided in favour of the plaintiffs.

On the defence side, nine witnesses testified in court. All were parties in this suit as defendants. **DW1** Aidani Aloyce Mwingizi (2nd defendant) stated that, he owns four acres of farm land, which he purchased in year 1996, tendered the contract of sale as exhibit DE1(a) & (b). He further stated that, between his land and the plaintiff there is a road dividing them. He purchased other pieces of land from different owners in year 1987 and a sale agreement was admitted as exhibit DE2. His farm is

known to the first plaintiff, actually he is the one who used to cultivate his farm by his tractor for payment. They have had no dispute ever since. In cross examination he affirmed to know the plaintiffs land that it is surveyed, has a certificate and defined boundaries.

DW2 Benson Mbugi (4th defendant), a farmer of maize and sugarcane, swore and stated that, he knew the plaintiffs as they are his neighbours on the east of his farm. He owns 2 acres he purchased in year 2002 from Abdallah Matua's family. He tendered the sale agreement dated 04/12/2002 and admitted in court marked exhibit DE3. That there was no dispute since then, and he has been in occupation for at least twenty (20) years. In this dispute, the disputed area is about 50 paces of his land.

DW3 is Rajabu Mkamila (6th defendant) who claims to have been born in Iringa, but came to Kidodi in year 1959. His father cleared a virgin land, by then neighbouring with an Arab called Twalib. His father passed away on 1989 leaving the two acres of land to him, which he has been occupying since 1989 to the date of hearing this suit. Testified that, the plaintiffs are his neighbours and they are the ones who clears the roads and boundaries between them. Those boundaries have remained intact ever since. He tendered a certificate of cane growers' registration by Sugar Board (Bodi ya Sukari) Tanzania, dated April 2009, the exhibit which was admitted as DE4. His farm was examined and registered as well. Tendered a delivery note of 1992 in his name, admitted as exhibit DE5. Stated that, out of his two acres, one acre is in dispute with the plaintiffs.

DW4 Peter Kitale (7th defendant), is another defence witness. This one testified to know the plaintiffs as his neighbours and that he formerly worked in the first plaintiff's company. He owns 6 acres which he bought from one Binti Zena Kunyaga in 1994. He tendered the sale agreement

which was admitted as exhibit DE6 in which, the first plaintiff was one of the witnesses. Boundaries are well known; the plaintiffs are his neighbours. Pointed that the dispute arose in year 2005. It went up to the District Land Tribunal, which visited the suit land with a surveyor. The surveyor said he invaded about 50 paces.

DW5 Charles Mayunga, owns 3 acres in different parts of the disputed land, which he bought from different persons in 1993, 1996 and 1998; Petro Nguwa, Anthony Malonda and Rashid Mhanga respectively. The three sale agreements were admitted as DE7 (a)(b)(c). He stated further that, when the tribunal visited the dispute land, verified and said the witness had invaded 58 paces on the land he purchased from Rashid. In the land bought from Anthony, the plaintiff said he invaded about 6 paces, same as on the land he bought from Petro.

Salma Salum Ngwembele **DW6** stated that, she owns eight (8) acres at Nyamamba, Kidogobasi which she inherited from her parents who owned since the year 1955 by clearing virgin land. The plaintiffs are her neighbours and they know her land. They are the ones who clears the road which separate them, using their tractors. Her parents died in the year 2010 and in the year 2011 she started owning that land. That the surveyors said that she had invaded 35 paces.

The next witness is **DW7** Hassan Myinga, who on oath testified that he owns 5 acres of land, which he inherited from his parents. He says when he was born, he found his parents cultivating that land. The plaintiffs are their neighbours. His father died in 2005 and he proceeded to cultivate the land to date. The plaintiffs are the ones who clears the road, which separate their farms, using their tractors. The road is there ever since. But the dispute started before the death of his father.

The 28th defendant, Ferdinand Kisawani. In some previous records erroneously referred to as Alfred Kisawani, having himself revealed before this court of his proper name, rectification was duly made. He testified as **DW8**. He told this court that, he owns 8 acres at Kunguru Mwoga area. He purchased the land from one Gwakisa Kibona in 2020. His land borders Mzee Ngutu on the West and North. One Moloma is on the East and the road on the south. Plaintiffs are his fellow farmers, but their farms are in different places, they are not his neighbours. He tendered the sale agreement as DE8.

The last witness **(DW9)** is Rashid Mlawa (31st defendant), a peasant who told this court that, he owns 2 acres which, he inherited from his parents who died in 1990. The plaintiffs are their neighbours who have been clearing the roads every season. They know and honour the boundaries. But the land tribunal when visited *locus in quo* with a surveyor, they said he had invaded 8 paces.

After conclusion of evidences from both sides, this court ordered the learned advocates to file their final written submissions on 09/06/2023. Commendable is to both learned advocates obedience and promptness with industrious in put to the subject matter. The industrious research work they have performed in their straight forward submissions is highly acknowledged and recommended by this court.

Brief recap of their arguments is that, advocate Jackson Liwewa, commenced his submission by introducing the matter same way as I have earlier alluded. He summarized the evidence of both parties and discussed to the issues. Addressing on the first issue of whether the defendants are trespassers. He state the law on burden of proof citing the decision of **Barelia Karangurangu Vs. Asteria Nyalambwa, Civil Appeal No.**

237 of 2017 where the Court of Appeal restated on the burden of proof. Referring to the plaintiff's title deed Exhibit P1, then justified by referring to the case of **Athuman Amiri Vs. Hamza Amiri and Adia Amiri, Civil Appeal No. 08/2020**, on a holding that, certificate of title is conclusive. He suggested that following the decision of the Court of Appeal, then the plaintiffs are the actual owners.

Having so crafted his conclusion in the first issue, he proceeded to the second issue. Mr. Liwewa submitted that, the evidence tendered by the plaintiffs and the surveyor who translated the map testified that, the defendants invaded the plaintiffs' land and even at the time they were cultivating sugar cane. He referred to what the defendants admitted about what transpired at the locus visit by the land tribunal and the statement by **PW2** (the surveyor). He observes that, his testimony was not cross examined. Standing on the rule of adverse inference in failure to cross examine, suggested that the defendants accepted the truth that, they are trespassers. He brought to this court's attention its previous decision in the case of **Emmanuel Joseph Vs. R, Criminal Appeal No. 323/2016 at Arusha.**

Approaching to the conclusion, Mr. Liwewa argued that, the plaintiffs in this case had heavier evidence, as was decided in the case of **Hemedi Said Vs. Mohamed Mbilu [1984] T.L.R.113,** thus concluded that the plaintiff should win.

Regarding the reliefs, the learned counsel submitted briefly that, the reliefs prayed by the plaintiffs in their plaint be granted.

On the adversarial side, advocate Chuwa, stood firm in his submission by commencing his argument by addressing on the first issue. That he strongly disputed on the alleged trespass of the defendants to the

land of the plaintiffs. He pegged his argument on four areas; **First,** on equality of customary right of occupancy, deemed right of occupancy and granted right of occupancy. **Second,** Long occupation and use of land in presence of the plaintiffs. **Third,** ownership by purchase which were executed before issuance of certificate of title as the certificate cannot override the rights. **Fourth,** demarcations in certificate of title No. 38788 was done without involving the neighbours that is why no beacons were placed by the plaintiffs.

Mr. Chuwa started by recap that, **PW1** and **PW3** admitted on the fact that they do not know how the defendants trespassed the suit land, while **PW1** and **PW2** did not know the extent of that trespass. **PW2** (a surveyor) testified that 22 acres were trespassed. Mr. Chuwa challenged **PW2** for stating that after verifying the boundaries he prepared a report, but that report which according to him shows the defendants have trespassed the plaintiffs' land was not tendered in court during trial, the omission was fatal.

The learned counsel pointed out that, PW1 and PW3 owned the suit land from 2000 as the tendered certificate of title. Therefore, they never installed any beacons as no beacons were seen to demarcate their farm. All through their co - existence, the demarcation between the parties were the roads on both sides, such boundaries existed since 1980s. The defendants were selling their sugar cane to the plaintiffs' company the plaintiffs themselves went to harvest from those farms. Sometimes they (**DW1**) leased the plaintiffs' tractors to cultivate their farms. The plaintiffs were therefore are fully aware of the boundaries. At all that time, they did not raise any boundary dispute until 2016/2017. This is according to the evidence of **DW1, DW3, DW5** and **DW6.**

The learned advocate is of stemmed position that, long ownership, occupation and use of the disputed land by the defendants favours them. Justified his argument by citing part I item 22 of **the Law of Limitation Act, Cap 89** along with the case of **Nassoro Uhadi Vs. Mussa Kavunhe [1982] T.L.R.302** to devise an argument that, if one occupies another person's land for a long period of time and develops it, he acquires the ownership by adverse possession. The learned counsel raised a valid question in respect of **PW1** who knew defendants were trespassers why he witnessed the sale agreement as per exhibit DE6? He rightly invoked the best evidence rule, that under this circumstance the plaintiffs are estopped from claiming that the 7th defendant is a trespasser by oral account against documentary evidence.

The learned counsel presented the land law jurisprudence in our country in respect of registered and unregistered land as well as various types of land rights as provided for under **the Village Land Act No. 05 of 1999.** Mr Chuwa rightly observed that, customary right of occupancy and granted right of occupancy are equally recognized. No right of occupancy is superior to the other. He pointed out that, **DW3, DW6**, 13th defendant, **DW7** and **DW9** have been living in their respective land time immemorial. They were born thereon and even after death of their parents they continued using the said land to date. A certificate of title issued on the year 2000 should not be considered superior to the deemed right of occupancy under sections 14 and 18 of **The Village Land Act** along with the case of **Mtoro bin Mwamba Vs. The Attorney General, [1953 - 1957] 2 TLR 103** where various methods of acquiring land were extensively discussed.

In this case, defendants had different types of ownership; purchase **(DW1, DW2, DW4)**. The plaintiffs did not call the Registrar to testify on how the certificate of title was issued and whether neighbours were involved. Setting the demarcations in the exercise of placing beacons and issuance of certificate of title was not made in consultation with neighbours.

On the issue of reliefs, Mr. Chuwa suggests that, the reliefs claimed by the plaintiffs be ignored. Existing boundaries be respected as the survey and issuance of certificate was made when the defendants existed prior. Mr. Chuwa made another observation that, if the survey and subsequent issuance of certificate was done by involving the defendants, the dispute would have been avoided. Thus, rested by a prayer that the suit be dismissed with costs.

Proceeded to pray that, the defendants be declared as rightful owners of their respective farms. The certificate of title was issued when some of the defendants had owned the said lands by different methods and occupied for more than 12 years and at peace with the plaintiffs. Further suggested that if the plaintiffs want the defendants' land, they should pay compensation.

Having paid a glance at the parties' pleadings, testimonies and written arguments, the remaining duty of this court is to determine the matter through the issues framed by both parties. In this suit, the main issue is whether the defendants are trespassers to the plaintiffs' land. A consequential issue of reliefs will follow the cause in the first issue and dependent on the parties' prayers.

This court exercises an original jurisdiction over this suit; thus, the court had the advantage of observing parties and witnesses during trial. At

the onset I can state categorically that, by their statements and coherence of testimonies, all witnesses from both parties were truthful and reliable on the issues of facts.

In deciding the drawn issues, this court will be guided by the relevant principles of law on burden of proof of facts in civil suits, both parties are cognizant of this rule as they submitted at reasonably length. The spirit of the rule is that a person who would want the court to adjudicate the cause he pursues in his favour, he is bound to prove it to the standard required. The rule applies in all jurisdictions save on criminal cases where proof is beyond reasonable doubt. In our jurisdiction, **The Evidence Act, [Cap 6 RE 2022]** provides on the burden of proof under sections 110 and 111 that: -

> *"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

It is also known that performance of that burden of proof must be established to the required standard. The legal standard of proof in civil or land cases is on preponderance of propensity or in other language on balance of probability. The same is given under section 3 (2)(b) of **The Evidence Act,** that a fact will be treated as proved in civil case if its existence is established by a preponderance of propensity. Also, this court (Massati, J) discussed at length in **Sangijo Rice Millers Company Ltd Vs. S.M. Holdings Limited [2006] T.L.R. 89.** The principle extends further to sections 112, 115 and 122 of **The Evidence Act.** Almost all the

provisions discussed in **Sangijo** are relevant to this case, although I am not attempting to say the case is similar to this at hand yet the applicable principles are similar. Section 122 for instance, provides as follows: -

> *"A court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case"*

Other principles applying in land law jurisprudence, include those Mr. Chuwa has pointed out in his submission, which as well will earn consideration in the course. In examination of the evidence, testimonies and the exhibits, I find that the centre of dispute touches respective different small sized farm land plots occupied by the defendants, who most of them are neighbours surrounding the plaintiffs. The latter own a vast part of land in that area to the extent of 515 acres operating a registered cane field.

The two plaintiffs' claim some 22 acres out of 515 acres are trespassed by 31 defendants. All defendants deny to have invaded the plaintiffs' land, but claim to have acquired their farms through purchase and inheritance from their parents. However, from the testimonies, I have observed that, there are established facts not in serious dispute between the parties, as summarised hereunder.

The plaintiffs and their father have been good neighbours to the defendants and their parents ever since their respective occupation in the land, that is, since the years 1950s when they occupied the claimed land. Also the plaintiffs have been aware of the defendants' occupation, since then and in some parcels of land the first plaintiff has been a witness in the defendants' purchase. Among the demarcating boundaries is the road that

separates the plaintiffs from the defendants and the plaintiffs have been clearing and undertaking maintenance of the road season by season. In some seasons the plaintiffs were hired to cultivate some of the defendants' farms by their tractors, boundaries were known to them. For that whole period, they have been in good relationship, no one complained against the other until when the plaintiffs or their father instigated this dispute. There were no other formal boundaries until when a survey was conducted in some later years and there is no indication that such survey of about 515 acres, comparatively massive land, involved the neighbours, especially the defendants. The survey and issuance of certificate was made subsequent to long occupation of some of the defendants and peaceful co-existence of the two sides. Even after survey and issuance of certificates, the parties did not follow the new demarcations, but the old local boundaries were honoured by both parties without any compromise.

According to the evidence of the defendants, such neighborhood and co-existence has been in place for more than 50 years to some defendants. Generally, defendants' root of title seems to be stemmed as old as that of the plaintiffs. I have observed that, in this suit, every party has been in effective occupation, although the plaintiffs claim to have left some 20 meters from the boundary uncultivated which suggests to be the gray area the defendants took advantage of.

Trespass to land is known as an unwarranted interference with another person's land. **Sir William Blackstone in Book III of *Commentaries of the Laws of England (1936)*** gave broad interpretation of trespass at page 133 that: -

"Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close: the words of the writ of trespass

commanding the defendant to show cause quare clausum querentis fregit. For every man's land is, in the eye of the law, enclosed and set apart from his neighbour's and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal, invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field"

This court is tasked to tell whether the defendants are trespassers. Focusing first on the plaintiffs' case, I can say the facts established by the defendants were not seriously disputed by the plaintiffs; *first* – the co – existence of parties with the old boundaries before the survey. *Second* – the survey was conducted some later years without involving the neighbours. Although on **PW2**'s evidence, the farms occupied by the defendants encroaches some paced to the plaintiff's farm according to the certificate of title and the map. The defendants do not seem to discredit legality and validity of the map and certificate of title exhibit PE1, but they dispute its legitimacy.

The plaintiffs while aware of the existence of the defendants, seems to have entertained their existence and even gave them good cooperation ever since. They failed to mediate this dispute through all other avenues. Now the plaintiffs, assisted by Mr. Jackson Liwewa invites this house of justice to *uproot the pumpkin from its old homestead* by following the interpretation of the map in exhibit PE1 as **PW2** presented in his testimony. Mr. Bernard Chuwa on the other side wants this court to *let the sleeping one continue sleeping undisturbed.* He invites this court to confirm the old boundaries and order the parties to honour them forever in their continuous use of neighbouring farms.

I would agree with Mr. Liwewa that if the certificate of title would be a piece of evidence to prevail in respect of the demarcations, then most of defendants in this case would be condemned to have trespassed into the plaintiffs Farm No. 177, Title Deed No. 38788, L.O 137754. Also, if we were to strictly follow the case of **Athuman Amiri Vs. Hamza Amiri and Adia Amiri** that he who holds a certificate of title is the exclusive owner of the land, it would be easy for this court to conclude this issue. But knowing that the precedent referred by Mr. Liwewa is not an absolute rule and considering that in this case procurement of the certificate of title is questioned on its legitimacy, and that it cannot resolve the question of demarcation between the parties, I hastily depart from Mr. Liwewa's argument.

Obvious adjudication of land disputes requires upholding of the land policy which in essence gave birth to the basic principles that reside in the land legislations including the **Land Act** and **the Village Land Act.** It is opportune to state though briefly some of the basic principles.

Under section 3 (1) of **The Village Land Act**, which is *pari materia* to section 3 (1) of **The Land Act** provide *inter alia* for promotion of the fundamental principles of the National Land Policy by ensuring that existing rights and recognised long standing occupation is secured by law. Equitable distribution and access to land by all citizens and to ensure that land is used productively and compliant to the principles of sustainable development. In this matter, more than 30 citizens holding lands around the 515 acres are about to be displaced.

The cases of **Mtoro bin Mwamba, Attorney General Vs. Lohay Akonaay and Joseph Lohay [1995] T.L.R. 80 (CA)** and **Charles Mushatshi Vs. Nyamiyaga Village Council and Another (Land Case**

No. 8 of 2016) [2020] TZHC 4156 handing down an interpretation of section 18 of **The Village Land Act,** our courts have maintained that a customary right of occupancy is in every respect having equal status and effect to a granted right of occupancy. Mr. Chuwa was therefore right in his submission in respect of the 6th, 12th, 22nd and 31st defendants who had the evidence that they inherited the said land from their parents. Again, a reasonable weigh, their parents' occupation dates almost equal to the plaintiffs' parents.

Considering both law and equity, I find that even the plaintiffs themselves did not want to disturb the defendants, that is why, they cooperated with them in their occupation of farms which now are claimed to be proceeds of trespass. There being no change of boundaries, it is amazing why did the plaintiffs think there is a cause of action against the defendants who have been in that land for decades?

I have deeply analyzed this situation in line with the applicable laws, an immediate question is whether in law the first plaintiff would be entitled to any right against the innocent purchasers whom among them the first plaintiff witnessed the purchase of their land without any objection, either to the seller or to the purchaser, which land today, they are termed as trespassers? The court is troubled to decide who among the disputants is a legitimate owner with which boundaries between those unilaterally sketched in exhibit PE1, subsequent to the parties' long occupation and without involving neighbours or the local boundaries intelligibly and mutually accepted by both parties for all the decades of their occupation?

Applying usages, customs and the doctrine of estoppel, which in this case will stand against the plaintiffs? I think this court is strengthened to rule that exhibit PE1 and the survey, which marked the demarcations

between the parties, those demarcations being visible or invisible and any markings whatsoever, which made the plaintiffs conceive the sense of defendants' trespass in their land, may have been erroneously made, particularly in respect of the boundaries.

Although the sketch in Exhibit PE1 appears to be clear, there is an irritating question of how could the certificate be issued in 1991 covering the land of persons like 6th, 12th, 22nd, and 31st defendants whose root of title was in existence before such issuance of certificate. Not only that, Exhibit DE2 tendered by the 2nd defendant (**DW1)** dates back to 22/02/1987. Again, the defendants remained in effective occupation of their pieces of land undisputed even after the certificate was issued for more than 20 years, reckoning on 2013 as when the dispute began as per plaint.

I do not ignore the Court of Appeal's decision in **Athumani Amiri**'s case regarding the prevailing of a certificate of title, but I would want the learned counsel of both parties to understand that such a position is applicable where all other factors are constant. Otherwise, there are cases where a trespasser may outsmart the rightful owner and secure the certificate of title before the genuine owner. Again, matters of survey and issuance of certificates are human activities not immune from errors. As in this case it is very probable that during survey and issuance of certificate, the neighbours were not fully consulted and thus slight errors on marking boundaries may occur.

The defendants have demonstrated sufficiently that their occupation and root of title have been in place ever since. To the contrary, the plaintiffs by conduct as I pointed earlier, indicates that they acknowledge the status of those defendants as rightful owners of their respective farms.

Even all the exhibits that the defendants tendered were not objected, this court finds them to be genuine and reflects the true undertaking. In such circumstances, I am convinced, the defendants are not trespassers.

There is a common law doctrine of estoppel, which is relevant to the law of evidence holds that, silence is admission against one with duty to speak. The first plaintiff, who is now claiming to be a sole owner of the 515 acres would be expected to decline witnessing the purchase of **DW4**, he would outright speak of the proper boundaries if those in place were not the ones. He would have challenged **DW1** When he was taking the tender to cultivate the land be telling him that the land he hires the plaintiff to cultivate by his tractor is not farms, but falls within the boundaries of the plaintiffs' land. He would not keep on clearing the road season by season and leave the other side for the defendants who are trespassers. They would not accept the sale of sugarcane by a trespasser, go to that land and harvest the sugar cane season by season without telling the seller of sugarcane that the land upon which he made cane field is not his. Actually, the dispute would have arisen very earlier than now.

Therefore, applying law and equity properly, the plaintiffs are estopped to claim and testify the contrary of what they have been doing. One of the oldest decisions by the High Court Chancery of England and Wales in the case of **Hunsden Vs. Cheyney [1690] 23 E.R. 703**, is among the persuasive relevant proponents regarding the doctrine of estoppel, where *inter alia* held: -

> *"A person witnessing a document would be estopped by virtue of being a witness at most from denying the formality of its execution."*

Yet in another English case of **Taylor Fashions Ltd Vs. Liverpool Victoria Trustees Co. Ltd [1981] 2 W.L.R. 576**, whose reasoning is much relevant in our case, it was observed *inter alia:* -

> *"Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding"*

That observation was well considered by this court Commercial Division in the case of **Sabri Muslim Karim (formerly Known as Sabri Ally Saad) Vs. Muslim Shivji Karim & 3 Others (Commercial Cause No. 54 of 2022) [2023] TZHCComD 83** and specifically, the doctrine of estoppel by acquiescence where the court devoted an illustrative definition that: -

> *"By definition, estoppel by acquiescence is a common law doctrine. It is applied in a situation where a party who is duly made aware of a fact or a claim by another party, fails to challenge that fact or refute that claim within a reasonable time"*

There are other decisions of this court and the Court of Appeal where this rule has been applied in relevant civil cases including the case of **Parvis Gulamali Fazal Vs. National Housing Corporation, Civil Appeal No.** 166 of 2018, **Bytrade Tanzania Limited Vs. Assenga Agrovet Company Limited** and **another, Civil Appeal No. 64 of 2018**.

The basic spirit of estoppel in our jurisdiction is provided under section 123 of **the Evidence Act,** among other laws, which provide general insight of this doctrine as quoted hereunder: -

> **Section 123.** *"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing."*

Having established that base, I am worried it would be an instigation of disharmony and furnacing of endless litigation in this case for a reasonable court of law to declare such citizens as trespassers. I will resolve the first issue in negative. I have demonstrated by following the law, justice and equity that the defendants are not and have never been trespassers. There is no strong evidence which would even by far, suggest that status of the defendants.

The second issue is on reliefs. This issue is naturally dependent upon the first issue. The plaintiffs wanted the defendants be declared trespassers and that they should be ordered to render vacant possession. The defendants' pleadings were to the effect that, the suit be dismissed and the parties be ordered to continue respecting the old boundaries.

Due to the verdict, I have entered on the first issue, reliefs are dictated. This court dismisses this suit in its entirety. Considering the good neighborhood and mutual assistance that parties have had and maintained for decades, I order that each party should bear his own costs.

Further parties may wish to rectify the boundaries appearing in the plaintiffs' certificate of title through a process that will involve the

defendants in this suit and any other person interested in the land bordering to the plaintiffs. In other words, the natural original and ever existed boundaries should be respected by each party. Due to the nature of this case, parties should bear their own costs.

Order accordingly.

Dated at **Morogoro** on this **27th day of June, 2023.**

P. J. NGWEMBE

JUDGE

27/06/2023

Court: Judgment delivered in Chambers at Morogoro on this 27th day of June, 2023 in the presence of Benard Chuwa for Liwewa advocate for the plaintiff, and advocate Benard Chuwa for all the defendants.

E. C. Lukumai, Ag DR

27/06/2023

Right of appeal to the Court of Appeal fully explained.

E. C. Lukumai, Ag DR

27/06/2023