

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT TANGA

LAND CASE NO. 5 OF 2021

MIKIDADI SARAI BAKARI ----- PLAINTIFF

Versus

RAJABU KASSIMU ----- 1ST DEFENDANT

SHARO BRIAN ----- 2ND DEFENDANT

JAMBIA MWANYIRO DAGO ----- 3RD DEFENDANT

BONDE MWAMFUNDO KASIRANI ----- 4TH DEFENDANT

LIMO SAMWELI ----- 5TH DEFENDANT

ABDULKADIRI ABDALA ----- 6TH DEFENDANT

MSELEMU MOHAMEDI ----- 7TH DEFENDANT

MASSOUD KHAMIS NASORO ----- 8TH DEFENDANT

MAMA GUZO ----- 9TH DEFENDANT

JUDGMENT

K. R. Mteule, J

25 April 2024 & 9th May 2024

Mikidadi Sarai Bakari is suing the Defendants alleging the 1st Defendant to have trespassed into his land measuring 101 acres situated at Kibafuta Street at Mabokweni Ward, distributing the said

piece of land to the 2nd to 9th Defendants. According to the plaint, the Plaintiff obtained the said Land from his father who inherited it from his father or the plaintiff's grandfather. The Plaintiff is seeking for the following orders of this Court.

1. A declaration Order that the land in dispute of about 101 acres lawfully owned by the Plaintiff.
2. A declaration Order that the act of the 1st Defendant trespassing into the land in dispute was unlawful and the same is null and void.
3. A declaration Order that the act of the is Defendant distributing the land in dispute to the 2nd, 3rd, 4th ,5th, 6th ,7th ,8th and 9th Defendant was unlawfully and the same is null and void.
4. A permanent injunction to restrain the defendants from trespassing into the Plaintiff's land of about 101 acres situated at Kibafuta Street Mabokweni Ward.

Despite being dully served, the 1st, 2nd, 3rd, 5th, 6th, 7th, and 9th Defendants neither appeared nor filed any written statement of defence. Only the 4th and the 8th Defendants showed appearance and

defended the suit. In their joint 2nd Written Statement of Defence, they denied to have any interests in the disputed land. They disputed the fact that the land in question was ever surveyed. It is averred in the WSD that the land is owned by the family of the 8th Defendant which has been living there since 1996.

The plaintiff was represented by Mr. Ramadhani Rutengwe Adv. On the other hand, the 4th Defendant appeared in person while the 8th Defendant was represented by Mr. Christopher Wantora Advocate.

Upon hearing, the Plaintiff's evidence as given by **PW1** is that Mikidadi Sarai Bakari is the owner of a land measuring 109 acres located at Mleni Mzizima Ward. According to PW1, 8 acres out of 109 are located within Mleni Street while 101 acres are located within Kibafuta Street, Mabokweni Ward and that before the establishment of the streets, the entire land was in Mleni village in Mzizima Ward.

It is the testimony of PW1 that the land was orally offered to him in 2015 by his father Sarai Bakari who got it in 1972 from his father Bakari Sarai who got it from The Village Council in 1925 when the village was named Mangalia.

It is further testimony of PW1 that there are plaintiff's family graves in the disputed land which have been there since 1930 when Bakari Sarai buried his mother Kinanasi Msega and set some places covering about 30 acres for traditional rituals. He named some other deceased buried in the graves by Bakari Sarai including his sister named Halima Sarai and his young siblings named Rico Sarai and Hassan Sarai.

That, in 2016 he applied for the survey of his land by the City Council and his request was allowed vide a letter from the City Council Director dated 15/09/2016 (**Exhibit P1**). That the survey process commenced by city surveyors one being Mr. Sangana, supported by the Chairman of Mleni Street, named Shabani Muumini, the Street Executive Officers one Mshenga Mtoro and some members of the Street Council including Ali Kibute and Mohamed Muumini who cooperated in the identification of the land measuring 109 acres. It is the evidence of PW1 that after completing the survey he got a copy of the survey map (**Exhibit P2**). That on 26/01/2017 the drawn map was approved and on 15/12/2017 it was approved by the Director of the Council referenced as **TP Drawing No. 2/TAG/522/012017** with the family graveyard clearly indicated.

According to PW1 while all these happening, neither of the Defendants was there or objected until 2019 when the dispute arose emanating from the oil pipe project which passed in the land at the time when he was about to do installation of beacons to demarcate the surveyed land. He added that since by that time the land was now falling within two streets, partly in Kibafuta and partly in Mleni, he had to seek approval from both streets, but Kibafuta Street never approved the survey for 101 acres. According to PW1, the Chairman of Kibafuta one Rajabu Kassimu told him that his issue needed movement of the Ward Office and so on the next day, he went to Kibafuta and the Council went to the farm with the Ward Leadership and asked him to show them the boundaries while having the plan drawings in his hands and he showed all the boundaries but from there he kept on making follow ups to get the minutes of the meeting from the street council to allow him to proceed with the survey of his land without a success.

According to PW1 the situation in Kibafuta remained still until when he heard about the oil pipe passing through his land. That he went to explain the matter to the people working with the project of oil pipe

who convened a meeting on the next day, composed of the two Chairmen of Mleni and Kibafuta and the leadership of the oil pipe project. That he showed them the boundaries of his land and they told him that they were going to the town planning offices to do verification and he was called there and was told that some people were set by Rajab Kassimu to be compensated for his land and he was shown the names and photos of those people vide a screen listing the names of **Lyimo Samwel, Bonde Mwamfundo Kisarani, Masoud Hamis Nasoro, Sharo Brian, Jambia Mwnyiro Dago, Abdulkadiri Abdallah, Mselmu Mohamed and Mama Guzo** who are the 2nd to the 11th Defendants.

It is further testimony of PW1 that after seeing this, he complained before Mabokweni Ward where Kibafuta Street is located when the Ward Executive Officer was Salimu Mdoe and the Councilor Juma Ramadhani, to the District Commissioner and the District Administrative Officer Makuka, to the City Solicitor Ipyana Alinuswe Mlilo and all could not help. That the City Solicitor advised him to sue for his rights.

Upon being cross examined as to why his survey was based on approvals from only Mleni and not Kibafuta, PW1 replied that the initial survey processes were done before the separation of the two streets of Mleni and Kibafuta. According to him, the separation found the survey already in process while by that time, the entire land fell within Mleni until in 2019 when new separation boundaries were set making the 8 acres remaining in Mleni and 101 acres in Kibafuta. On further cross examination as to what is contained in the land, PW1 testified that he was using the land for agriculture mentioning crops in the farm including coconut Trees, Mango trees and the graves.

On Defence, the 4th Defendant testified as PW1 and he denied to have any claim of ownership over the disputed land. According to him, during the oil pipe project, he stood on behalf of one Twaha Mfaume Salim. Equally, the 8th Defendant who testified as DW3 denied any ownership over the land in his personal capacity. He claimed that the land belonged to his father who passed away in 2016 and now it belongs to the family.

Having summarized in a nutshell, the narration of the position of each side on the matter, I now come to address the issues framed during the final pretrial conference. The said issues are:

1. Who is the Lawful owner of the suit land?
2. Whether the Plaintiff has a cause of action against the 4th and 8th Defendants.
3. Whether the disputed Land is surveyed and whether the procedures were followed.
4. What Reliefs are entitled to the parties.

In addressing the above issues, parties got an opportunity to file final or closing written submissions. I am thankful for their industrious work which shall be considered in determining this suit.

On the issue as to who is the owner of the suit land, neither of the Defendants claimed ownership to the land. The 8th Defendant denied to have any personal ownership in the land but he knew it belonged to his family which has been staying there since 1996. But when he was cross examined, he could not tell how his father got the

ownership of the said land. The 4th Defendant completely denied having ever owned any land in the disputed land. In his submissions Mr. Wantora, the counsel for the 8th Defendant recalled the evidence given on the existence of permanent crops like coco nut tree, cashew nut tree, mango tree and lime tree of some good years planed by the 4th Defendant's late father MASOUD MASOUD which in his view constitutes sufficient evidence to prove that he was the owner of the farm. In view of Mr. Wantora, since that evidence was not cross examined by the Plaintiff to discredit it, such failure to cross examine on material evidence implies the evidence to be true. He supported his position with the case of **Kanaku Kidari vs The Republic, Criminal Appeal No. 326/2021, Court of Appeal of Tanzania at Dodoma**, where the Court Held :

"Failure by the appellant to cross-examine PW3 on the alleged land dispute, it means that there was no such matter and PW3's evidence remained to be an established fact."

On the part of the plaintiff, PW1 explained that he owned the land after having it offered to him by his father Sarai Bakari. The said Sarai

Bakari who is the father of the plaintiff testified as PW2 and confirmed having offered the said land to his son, the plaintiff. The survey process was evidenced by the documents involved in effecting it. The documents included the letter by the City Director approving the survey (**Exhibit P1**), and the TP Drawings arising from the survey, referenced as **TP No 2/TAG/522/012017, (Exhibit P2)**. One thing to note is that the survey indicated to have involved a land measuring 109 acres withing Mleni but now the disputed land of 101 situated in Kibafuta. This puzzle was resolved by the answer of PW1 on cross examination which indicate that initially there was one village Mleni which was later separated to have two streets one being Mleni and the other one Kibafuta. It is resolved that the land of 101 acres felt in Kibafuta while the 8 acres remained in Mleni but the commencement of the survey found the entire land in Mleni. The evidence of PW1 on this explanation was supported by the evidence of Omar Ally (PW3) who testified to have been involved in identification of the land during the survey when he was the Council member for Mleni Village Council.

Apart from these survey documents, PW4 who is a Town Planner testified and recognized **Exhibit P2** as a valid Land Plan Drawing which was obtained after the compliance with all the survey procedures. The existence of graveyards for the family of the Plaintiff and PW2 in the disputed land is an indication that the family occupied the land.

I agree with the principle in the case cite by Mr. Rutengwe **Hemed Said vs Mohamed Mbilu [1984] TLR 113** that;

"In law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win"

Basing on the authority in **Hemed Said supra**, I will compare the evidence of both sides concerning the ownership to see which side has got stronger evidence to make its case. The only evidence from the Defendants' side which indicate who is the owner of the disputed land is that of DW3 who sated that the land belonged to his father. DW2 gave a long account of the occupation oof the land but challenging the right of the father of the plaintiff to inherit the land.

But upon cross examination, he said the story he was telling happened before he was born and that he heard it from his wife who comes from the family of the Plaintiff. The source of this evidence questions the credibility of this witness since it is all hearsay.

Coming to the evidence of DW3, he claimed that the land belonged to his father. However, when cross examined, he could not state how his father obtained it. DW4 testified to support the evidence of DW3 by stating that he has been farming on the disputed land by the father of the 8th Defendant since Nguvu kazi error. He did not remember the exact year. He did not state clearly how the father of the 8th Defendant got it apart from stating that it was the time when Nguvu Kazi Policy was operational. In my view, this is not enough to prove ownership in a better explanation than what was stated by the Plaintiff's witnesses including PW1 who traced the unbroken passage of ownership from 1923 when his grandfather got it from the Village to when it passed to the Hands of his father PW2 who confirmed to have offered it to the plaintiff. The statement of how he surveyed the land was not disputed. It was supported by the drawings from that survey and the Town Planner (PW4) who confirmed the drawing to be

a valid survey. I take note of what the Plaintiff stated in evidence that no one objected to the survey exercise. I have the same query that if there was anyone claiming interest in the land, when the survey commenced, that person should have come up to raise objection.

None of the witnesses presented a different assertion on the existence of graves in which the relatives of the Plaintiff and his father were buried. This further cement the proof of ownership of the disputed land by the plaintiff.

From the above account, comparing the evidence of DW3 and their supporting testimonies and that of PW1 and the supporting testimony the scale is heavier on the side of the Plaintiff on this issue of ownership. The owner balance of probabilities, I can answer the 1st issue that the owner of the suit land is the Plaintiff.

I have considered the argument raised by Mr. Wantora Adv for the plaintiff that the suit land is not clearly described. According to Paragraph 3 of the Plaint, the suit land is described as a piece of land measuring 109 acres situated in Mzizima Ward, and Mabokweni Ward in Tanga City Council whereas 9 acres out of them falling in Mleni

Street and 101 acres situated in Kibafuta Street in in Mabokweni Ward. The evidence of the Plaintiff clearly described the land to be the one represented by the drawings on the Survey Plan which was tendered as Exhibit P2. Neither of the parties disputed the clarity of this description. In my opinion there was no issue on the description of the land in dispute.

The **second issue** is whether the Plaintiff has a cause of action against the 4th and the 8th Defendants. According to the Plaintiff, the Plaintiff sued the Defendant alleging trespass. In ascertaining what amounts to trespass, I would adopt the definition of found by Mr. Rutengwe Adv in his submissions having cited the case of **Coburn College [1897] 1 QB 702** to mean:

"every fact which if would have been necessary to prove, if traversed, in order to support (a) right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved".

What I construe from the above evidence, a cause of action is what is alleged subject to proof by evidence. As rightly submitted by Mr. Rutengwe Adv, paragraph 8 to 11 of the plaint alleges that the trespass into the land by the 1st Defendant who distributed his land to the Defendants, the 4th and the 8th Defendants being among them. In my view, trespass constitutes a cause of action. Whether such cause of action is substantiated or not is a matter of evidence. Since the 4th and the 8th are alleged to be the beneficiaries of unlawful act of trespass then there was a cause of action in the plain.

According to Merriam Webser Online legal Dictionary, the word trespass is defined as *"to enter unlawfully upon the land of another."* In the evidence, the Plaintiff claimed that the Defendants stood as the owners of the Land before the officers dealing with oil pipe project. The 4th Defendant did not dispute this allegation, but his explanation is that he stood on behalf of someone else. Neither of the defendants disputed the allegation that they appeared in the records of the oil pipe project to be the owners of the land in dispute. Trespass means unlawful entry.

The 8th Defendant claimed that he stood in the village meetings on behalf of his family. In my view, there could not have been sufficient evidence to prove that what the defendants did to involve themselves in the activities related to the land in dispute could amount into trespass, but since the Plaintiff has managed to prove ownership over the land, it suffices to declare unlawful any act relating to the property without the consent of the Plaintiff.

In my view, although the 4th and the 8th Defendants agree to have been involved in some activities concerning the land, neither confirms existence of trespass. Therefore, the issue as to whether the Defendant has a cause of action against the Defendants is answered in the affirmative although not proved in evidence.

On the 3rd issue as to whether the disputed land is surveyed, I could not see any evidence on the side of the defendants to the contravene what PW1 narrated as steps taken to initiate survey process until where he was stuck when Kibafuta Street refused approval. Further to that PW4 who is the Town Planner testified to give expert opinion as a Town Planner to verify the validity of Exhibit P2 which was the survey drawings. In my view, I see no reason to question the procedure if

what was done was verified by a Town Planner to constitute a valid survey. In absence of a contrary evidence from the defendants, I am obliged to give credence to witnesses. In *Goodluck Kyando v. Republic* [2006] TLR 363 it was held:

"... it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

The above discussion answers the third issue affirmatively.

Regarding the fourth issue concerning the reliefs of the parties, I have taken note of what the plaintiff's prayers in the plaint. Since it is proved by the plaintiff that the land in dispute belongs to him, the first prayer is granted.

Since there was no proof that the Defendants did trespass into the Plaintiff's land, then the second prayer as well cannot be granted. On the same basis, this will apply for the third prayer, the fourth and the fifth prayer. As well, I could not see sufficient evidence from the

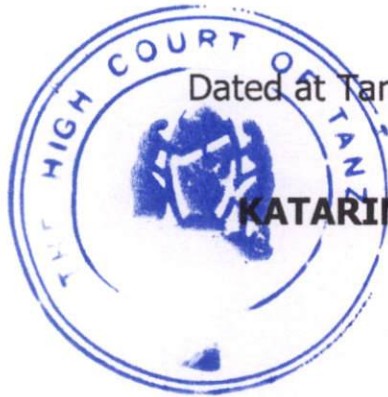
plaintiff to substantiate that the 1st Defendant distributed the lands to the defendants. Therefore, the third prayer cannot be granted.

Regarding the injunction to restrain the defendants from trespassing into the disputed land, this prayer is granted since there is evidence that in some extent, the defendants dealt with the suit land since the plaintiff testified to have seen their names in the offices of the oil pipe project indicating them to have presented themselves as owners. For the protection of the rights of the plaintiff to the land, this prayer is granted.

With regard to the costs of the suit, my assessment convinces me that since the defendants have denied ownership over the land, and since there was no direct proof that the said defendants trespassed into the land of the plaintiff, then there is no need to condemn them to pay costs.

Therefore, the suit succeeds to the extent discussed above. Consequently, I declare the plaintiff to be the lawful owner of the disputed land. I further make an order of permanent injunction to all the defendants to restrain them from trespassing into the plaintiff's

land situated at Kibafuta Street in Mabokweni Ward. No order as to costs. It is so ordered.



Dated at Tanga this 9th Day of May 2024

Handwritten signature of Katarina Revocati Mteule.

KATARINA REVOCATI MTEULE

JUDGE

9/5/2024

Court:

Judgment delivered this 9th Day of May in the presence of the Plaintiff and Mr. Ramadhani Rutengwe Advocate for the Plaintiff and 4th Defendant present in person and Mr. Christopher Wantora Adv. for the 8th Defendant and ex-parte against the 1st, 2nd, 3rd, 5th, 6th, 7th, and 9th defendants. Right to Appeal is explained.



Handwritten signature of Katarina Revocati Mteule.

KATARINA REVOCATI MTEULE

JUDGE

9/5/2024