IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF SONGEA)

AT SONGEA

LAND CASE NO. 5 OF 2021

SAULO J. SANGA AND 232 OTHERS.....PLAINTIFFS

VERSUS

THE REGISTERED TRUSTEES OF THE

CATHOLIC ARCHDIOCES OF SONGEA..... DEFENDANT

JUDGMENT

Dated: 7th February & 21st March, 2024

KARAYEMAHA, J.

This suit touches on the ownership of a parcel of land measuring 1160.98 acres currently located in Selekano Village within Liganga Ward in Songea District in Ruvuma Region. The parcel of land shall henceforth be referred to in this decision as the "suit land". The suit land is embroiled in an ownership tussle between the plaintiffs, who allege that they are the lawful owners thereof, by virtual of acquisition from previous owners by purchase, inheritance and by allocation and the defendant who alleges that these claimants were mere imposters who derive no interest in the suit land. The contention by the defendant is that the suit land was firstly owned by Tanzania Cigarette Cooperation (henceforth "TCC") and thereafter was purchased from her.

The dispute arose when the defendant alleged that the suit land (her land) had been invaded by the plaintiffs and in 2021 had at any cost to regain possession back. Eventually, the defendant took a bold step to demarcate it and put beacons. In the due course of doing that plaintiffs were ordered to vacate the suit land. The plaintiffs denied that they had trespassed onto the suit land.

This tussle over the suit land traces its origin in 2014 when the defendant sued Agathon Duwe and 11 others via Land Case No. 1 of 2014 instituted in the High Court – Songea claiming ownership of 1839.02 acres. This suit was amicably settled. It was further contended by the plaintiffs that the suit land is by no means related to the land claimed in Land Case No. 1 of 2014.

While the plaintiffs are alleging so, the defendant contends that the land involved in Land Case No. 1 of 2014 is identified by the certificate of the right of occupancy number 1431, Land Office No. 1182912, Plot No. 463 Block Liganga. Through a counter claim, the defendant claimes that she is the rightful owner of the suit land and labeled the plaintiffs as trespassers. It was further contended that the plaintiffs invaded the suit land which was the subject of litigation in Land Case No. 1 of 2014, commenced to make unexhausted improvements by

constructing structures and devaluating the soil. The defendant's conduct of deploying police officers to harass, humiliate and dehumanizing the plaintiffs distilled intolerable displeasure on their side. This triggered the plaintiffs' disgruntlement, hence their decision to institute the instant matter.

By a suit instituted in this Court on 01/03/2022 vide an amended plaint, the plaintiffs, in their joint capacities and through Saulo J. Sanga, moved the Court to grant the following reliefs:

(i) *Declaration that the plaintiff and 232 others are the lawful owners of the suit land;*
(ii) *Orders for the defendants to remove their demarcations and beacons;*
(iii) *Orders for general damages for trespassing the plaintiffs and 232 others land;*
(iv) *Orders for the payment of 500,000,000/= as punitive damages to the defendants for harassing, dehumanizing and humiliating the plaintiff and 232 others.*
(v) *Interest on the decretal sum at court's rate of 12% per unum from the date of judgment to the date of full satisfaction;*
(vi) *Costs of the suit;*
(vii) *Any other or further relief(s) as the Court may deem just to grant.*

In the amended written statement of defence (henceforth the WSD) filed in Court on 9/3/2022, the defendant vehemently denied that it trespassed in the suit land because the same is lawfully hers. The defendant similarly, moved the Court to grant the following reliefs:

(i) Court's declaration that the plaintiffs are trespassers on the land with certificate number 1431, Land Office No. 1182912, Plot No. 463 Block Liganga;

(ii) The court's order for forceful eviction of the trespassers from land with certificate number 1431, Land Office No. 1182912, Plot No. 463 Block Liganga;

(iii) Order for payment of Tshs. 420,000,000/= as compensation as claimed under paragraphs 16 and 17 of the plaint;

(iv) Interest on the decretal amount at the court's rate from the day of judgment to the date of payment in full;

(v) Costs of the suit;

(vi) Any other relief the Court may deem right and just to grant.

At the commencement of the proceedings four issues were drawn to guide the smooth conduct of the proceedings. They are:

1. Whether the disputed land is located in Chipungu Hamlet, Selekano Village within Liganga Ward.

2. Whether the plaintiff is the lawful owner of the disputed land.

3. Whether the defendant invaded the disputed land.

4. To what reliefs are the parties entitled to.

In a bid to prove their case, the plaintiffs paraded three (3) witnesses, namely, Prepetua Titus Gama (PW1), Galus Martin Monji (PW2) and Saulo Jainess Sanga (PW3) and tendered three (3) exhibits.

On the other hand, the defendant's allegations were supported by the evidence from three (3) witnsses, Fr. Kelvin Mkondola (DW1), Jackob Luoga, (DW2) who introduced himself as TCC lawyer and Said Mrisho Msananga (DW3) (authorized land officer). The defendant tendered five (5) exhibits.

Whereas the plaintiffs enlisted the services of Mr. Eliseus Ndunguru, learned counsel, Mr. Hillary Ndumbaro, learned counsel, represented the defendant.

Disposal of this matter will follow the sequence of the issues framed at the commencement of the proceedings.

In the first issue, the Court is called upon to pronounce itself as to whether the disputed land is located in Chipungu Hamlet, Selekano Village within Liganga Ward. The view held by the plaintiff is that the disputed land is currently located in Chipungu hamlet Selekano Village. This also surfaces in the plaintiffs' counsel's closing submission. This

issue in my considered view, should not detain me. The evidence particularly by PW1 is categorically clear that formerly there was one village known as Liganga. Later in 2020 Liganga Village was split into three villages, namely, Liganga, Selekano and Ngolongo. PW1's testimony was singled out to cement the contention. The evidence of PW2 cannot go unnoticed. He testified supporting PW1 that TCC was allocated land in Liganga Village which bordered Nakalai, Lihongwe and Selekano rivers and Magaugau hill. This truth was confirmed during the *locus in quo* visit.

From the evidence, I take the view that the disputed land was formerly part of Liganga Village before Serekano Village was established. Further to that according to PW2 the suit land is located at Lihongwe Juu in Serekano Village not in Chipungu hamlet. More so, the evidence convinces me that the disputed land was part of the land allocated to TCC by Liganga Village Council.

Next is the issue whether the plaintiff is the lawful owner of the disputed land. In this issue, the court is called upon to declare the plaintiffs the lawful owners of the land in dispute. The view held by the plaintiffs is that they have been able to conform to the requirements of sections 110 and 111 of the Evidence Act, [Cap. 6 R.E. 2022]

(henceforth the "EA") which cast the burden on the plaintiffs to prove the allegation that they are rightful owners of the land in dispute.

The contention is that the testimony of PW1, who was the member of the village council and a member of the Social Welfare and Development Committee for 15 years and PW2 who by 1980's was the member of the Village Council of Liganga have done enough to prove that the suit land is lawfully owned by the plaintiffs.

As summarized by the counsel for both parties, a total of three (3) witnesses testified in support of the plaintiffs' case. Each of the witnesses testified that the suit land belongs to the plaintiffs. PW1 and PW2 had a unanimous contention that TCC was given land by the village council. It appears from their evidence that both did not know the size of that land but according to them its boundaries were Nakalai river, Lihongwe river and Selekano river. Later they heard that the said land was sold to the defendant. PW2 brushed off the allegations by the defendant that the plaintiffs trespassed in her land. Apart from testifying that the suit land was allocated to plaintiffs, PW2 did not know when. It is also reckoned from his evidence that he learnt that fact from the plaintiffs.

The plaintiff contended further that the testimonies given by PW1 and PW2 were not subjected to cross examination, particularly, on the statement that the suit land is not part of the land allocated to the defendant. Mr. Eliseus Ndunguru relied on the decision of **Nyerere Nyague v Republic**, Criminal Appeal No. 67 of 2010 CAT-Arusha (unreported) to illustrate that failure to cross examine a witness on a certain matter is deemed to have accepted that matter.

The plaintiffs contended further that the defence testimony as given by the defence witnesses, especially DW2 and DW3, grossly contradicted itself on the authority that allocated land to TCC. It was pointed out that whereas DW1 said it was allocated to TCC by Songea District Council not Liganga Village Council, DW3 it was allocated to TCC by Liganga village council. In addition, it is stated, DW3 did not know who gave the land to TCC. This court was called upon not trust these witnesses because contradictions in their evidence go to the root of the case. I was invited to visit the decision in **Toyidoto Kosima v Republic**, Criminal Appeal No. 525 of 2021 CAT-Kigoma (unreported).

It was argued further that DW1, Fr. Kelvin Nkondola a member of the Board of Trustees of the defendant talked about purchasing Farm No. 25 from TCC but did not tender any document proving such a

purchase and the boundaries of the farm. To the contrary, he tendered a letter of winning a tender to purchase the farm. Sections 61 and 64 of the Land Act [Cap. 113 R.E. 2019] was cited to bring forth the requirement that disposition of surveyed land should be witnessed by writings or a memorandum. It was argued further that since DW1, DW2 and DW3 testified that the suit land was registered and had a letter of offer but it was registered after the dispute had arisen and instantly the defendant was issued with the title deed, exhibit DE4. According to the plaintiffs, exhibit DE4 indicates farm No. 463 not 25.

Other areas which the plaintiff consider to weaken the defendant's case are one, failure to tender a map owned by TCC which DW3 admitted that was in safe custody. Secondly, failure by the defendant to explain the whereabouts of the land after 150 acres were given to trespassers from 4597.55 acres purchased by the defendants and remaining with 2637.46 acres as per exhibit DE4.

The contention by the plaintiffs' counsel is that failure to give clear evidence on the remaining piece of land shepherding inconsistencies that go to the root of the case.

The plaintiffs' counsel went on punching holes in the defendant's case by contending that exhibit DE4 was unlawfully obtained because in

view of the evidence of PW1 and PW2 the land granted to TCC did not include the suit land.

Based on all this, the plaintiffs held the view that the suit land belongs to them and that they should be declared the rightful owners.

The defendant through their learned counsel attacked the plaintiff's case first by interrogating who the plaintiffs are. Apart from conceding that the suit was instituted under a representative capacity and Saulo Sanga sues on behalf of 232 others, but queried the authenticity. Mr. Ndumabaro's doubt was triggered by some plaintiff's failure to append signatures against their names. It is the defendant's contention that the absence of signatures denies Saulo Sanga *locus standi*. The learned counsel bolstered his arguments by citing the decision of the High Court in **Patrick Bundala Mlingwa & others v. Raki Hill Hotel,** Misc. Application No. 141 of 2017 (HC-Labour Division at Dar es Salaam).

On whether the plaintiffs established ownership of the suit land, the defendant's counsel laughed off at the designed pattern of having the plaintiffs' asserting ownership through unsubstantiated allocation, inheritance and purchase. The defendant contended that none of the plaintiffs mentioned who allocated land to them, from whom they

purchased land and inherited it. It was contended further that the plaintiffs failed to tender any document which according to him would prove that acquisition of the suit land was through disposition by way of sale or inheritance or allocation.

Submitting with regard to the evidence, the defendant contends that, the plaintiffs who are bound to prove their case and discharge the burden bestowed on them by sections 110 and 111 of the EA, failed to prove from whom they purchased and inherited the suit land from or who allocated the land to them. The defendant's contention is that no testimony was led to substantiate that. The defendant held the view that the plaintiffs failed to adduce evidence relating to some plaintiffs who inherited the land from their parents. In yet another contention, the defendant held the view that the evidence on record contradicted facts pleaded in the plaint. Citing paragraphs 3 and 4 of the amended plaint, it is submitted that the suit land is located at Chipungu hamlet/suburb of Selekano Village but PW2 informed this court that the suit land is located at Lihongwe Juu in Selekano Village. Other contradictions relate to the years the suit land was allocated to TCC, to wit, 1973 according to PW1 and 1980's according to PW2.

The defendant argued further that since the fact that the plaintiffs' claim was backed up by mere allegations, then the defendant held the view that equity lies on her because first, it proved to court when and how it acquired the suit land and secondly, that its ownership is authenticated by a Title Deed and land rent receipts which were tendered and admitted as exhibits DE4 and DE5 respectively. To bolster this argument, its counsel made reference to the Court of Appeal's decisions in **Athuman Amiri v Hamza Amiri and Adia Amiri,** Civil Appeal No. 8 of 2020 (CAT-Arusha) Tanzlii; **Leopold Mutembei v Principal Assistant Registrar of Title, Ministry of Lands, Housing and Urban development and another,** Civil Appeal No. 57 of 2017 and **Amina Maulid Ambali & 2 others v Ramadhani Juma,** Civil Appeal No. 35 of 2019 (all unreported).

After contending as such, the defendant urged this court to dismiss the suit with costs.

Before getting to the thick of the 2nd issue let me address the issue raised by Mr. Hillary Ndumbaro, learned counsel for the defendant that some of the 232 plaintiffs did append their signatures against their names authorizing the 1st plaintiff to represent them. He contended that Saulo J. Sanga lacked a requisite *locus standi* to sue on their behalf. I

have cursory gone through annexure P1 to the plaint and reached to the conclusion that the defendant's assertion is baseless. All 233 citizen of Seleano village who attended the meeting proposed Saulo J. Sanga to lodge a Land Case in the High Court of Songea. I hold the view that Saulo J. Sanga has a *locus standi* to sue on behalf of his fellow plaintiffs.

Driving home to the 2nd issue, as rightly stated by both counsel, a party that alleges existence of a certain fact bears the evidential burden of proving such existence. This is the import of sections 110, 112 and 115 of the EA. This cardinal principle will be my compass because it characterizes the discussion in this issue. The law under section 110(1) of the EA is that he who alleges must prove his allegation to succeed in a suit. It is equally the law that, unlike in criminal trials, the burden of proof in civil cases is not static. This rule is long settled as can be seen from the decision of the defunct Court of Appeal for East Africa in **Henry Hidaya Ilanga v. Manyama Manyoka** [1961] EA 705 referred in **Co-operative and Rural Development Bank (1966) Ltd v. M/s Desai and Company Limited**, Civil Appeal No. 51 of 1995 (unreported) and **Bright Technical Systems & General Supplies Limited v. Institute of Finance Management,** (Civil Appeal No. 12 of 2020) [2023] TZCA 17284 (30 May 2023, Tanzlii), amongst others.

As correctly prefaced by both counsel and, as gathered from the testimony of the disputants, the dispute in respect of the suit land has raged on for more than a decade, and it took this court's intervention to break the ice and to come to some kind of truce that subsequently paved the way for resolution. This can be gathered from Exhibit P3 (Settlement order in Land Case No. 1 of 2014), which provided the methodology that the disputants ought to have followed in resolving the matter. One of them was to release 130 acres by the defendant to the trespassers and have the dispute resolved amicably.

As gathered from the testimony, the plaintiffs' ownership of the disputed land was either through a direct purchase from the previous owners or through a bequest from their parents or kins or through allocation. However, in a fashion that strikes resemblance, no documentary evidence as sale agreements, deeds of gift for love and affection, or a semblance of any of it was produced to support the contention that titles to the said suit land passed on to them. I am mindful of the fact that documentary evidence is not necessary for unsurveyed land. In my firm view this position would apply on issues of inheritance which is to be proved by oral evidence and allocation of land

when the same is made locally at the village level and by considering the period allocation was made.

None of the persons who are said to have sold or offered the said suit land were called to testify that titles indeed passed to the plaintiffs. PW3 who alleged that he worked for Codrick who in turn gave him 20 acres in 2012, said that the latter died in 2022 but did not bring his relatives to back up his allegations. Sadly, this fact was not pleaded in the amended plaint filed in court on 1/3/2022. It has appeared in evidence. Hence of no evidential value. The trite law is that no party to a case must introduce new facts in the suit which were not previously pleaded. I am strengthened on this position by the decision of the court of Appeal in **Barclays Bank (T) LTD v Jacob Muro,** Civil Appeal No. 357 of 2019 (CAT-Mbeya) (unreported) that:

> *"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."*

Gleaning from the above cited authority, PW3's testimony is to be ignored. However, in order to cosmetic this decision I shall refer to his version to help me have swift flow.

With respect to plaintiffs who alleged that they were allocated the suit land by the village council, there is no concrete evidence from them to prove this assertion. The plaintiffs' counsel contended relying enormously on the evidence of PW1 and PW2 that some plaintiffs were allocated land. I have carefully examined their testimonies. Admittedly, they are weak. I hold that view because their statements are too global. They did not say how many were allocated land among the plaintiffs. They did not exclude PW3 in their evidence meaning that no land was allocated to Codrick entails the notion that PW3 lied to the court. PW1 and PW2 did not know the size of the land allocated and whether it was allocated to the plaintiffs themselves or their parents. To add salt on the wound, PW2 testified that he was told by the youths that Selekano Village Council allocated land to them. That being the case, it is very dangerous to believe him the reason being that he gave implausible evidence.

It is also contended by the plaintiffs that some of the plaintiffs inherited land from their parents. Apart from the fact that PW3 represented them all, I think it was very safe to have their evidence on record. That could have helped to strengthen their claim and shed light from whom did they inherit and their number would be revealed. Apart

from that PW3 did not know how many among the plaintiffs inherited land from their parents or kins.

Same fate befell on the evidence of purchase, no evidence was led to prove the purchase of the suit land. The plaintiffs did not even call any witness to categorically evidence that he/she sold a piece of land to the plaintiffs. In addition, no sale agreement was tendered to bolster their claim. What is stated by PW3 is just a general statement that some of the plaintiffs purchased land.

For the purpose of proving ownership of land through allocation, inheritance or purchase, specific evidence is of paramount importance. For the allegations relating to all modes of acquiring land where there are many plaintiffs, it is of utmost importance to lead evidence showing the number of plaintiffs who were allocated land, how many inherited pieces of land and from whom and how many were gifted and not simply to give a general statement alleging that plaintiffs acquired land in different ways including by allocation, purchase and inheritance valued at Tshs. 348,294,000/= as reflected in paragraph 4 of the amended plaint. The duty is casted on the plaintiffs by law to give evidence proving on the balance of probabilities how they acquired suit land.

Putting the plaintiffs' evidence and the defendants' evidence on the balance, I am behooved to land to a conclusion that the latter's evidence is heavier than that of the former. DW1 gave detailed evidence on how they acquired ownership of the suit land. Combining his evidence with testimonies of PW1 and PW2, it comes to the picture that the land which was allocated to TCC, was later in the ownership of the defendant. DW2 spoke of the same thing and stressed that TCC sold the land to the defendant. According to PW2, it was the village chairman who laboured to show the defendant the land owned by TCC. Apart from that exhibit DE5 reveals that the defendant has been paying land rent, the land which is in dispute.

PW2 testified further supporting DW1 that TCC land boundaries were Nakalai, Lihongwe and Selekano rivers. The visit to the *locus in quo* revealed that river Selekano is in the northern part of the suit land and the suit land is standing in the Southern part. This was ocularly observed and confirmed. Therefore, the contention by the plaintiffs' counsel that PW1 and PW2 testified that the suit land was not part of TCC's land is incomprehensible.

Of course, it has been submitted by the plaintiffs' counsel that DW2 and DW3 contradicted themselves on where TCC acquired the land

from and should not be believed, that there is no certainty on the size of the land owned by the defendant, that sale agreement which is crucially important and a requirement of law in disposition of land was not tendered, that no map was tendered and that exhibit DE4 was unlawfully obtained. I entirely agree with this submission with reservations on the manner exhibit DE4 was obtained. Nevertheless, I am also aware that the important fact is that weaknesses in the defendant's case are not a substitute to the requirement that who alleges must prove the allegations or that they become proof on the balance of probabilities on the part of the plaintiffs. They only tend to raise suspicion or reveal that the defendant is a trespasser and has no colour of right over the suit land when the plaintiff has discharged his duty vested on him/her by the law. In this case, therefore, plaintiffs have to prove how they acquired the suit land.

I am behooved therefore to agree with the defendant's counsel, that since the defendant has perfectly evidenced how she came into contact with the suit land and has tendered evidence he is the rightful owner of the suit property. On this position I am guided by the words of wisdom of the Court of Appeal of Tanzania in **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, CAT-Civil Appeal No. 45 of

2017 (Mwanza-unreported) which cited the splendid reasoning of Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All E. 372, from which the following passage was quoted:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."*

In the totality of all this, I entertain no doubt in my mind that the plaintiffs' efforts have not met the threshold of proof of their allegations as set out in sections 110, 111, 112 and 115 of the EA, and as emphasized in numerous cases some of which are cited above. I hold that the plaintiffs have failed to discharge the evidential burden of proving they are the lawful owners of the suit land. Such failure necessitates the application of the holding in **Hemed Said v. Mohamed Mbilu** [1984] TLR 113 cited by the counsel for the defendants, to the effect that ***"the person whose evidence is***

heavier than that of the other is the one who must win." The second issue is, therefore, answered in the negative.

Next on the line is the issue which requires me to state if the defendant invaded the disputed land. Whereas the plaintiffs contend that they are lawful owners of the suit land, it has been gathered from the evidence that they are not. I take the view that resolution of this issue is consequential and is dependent on the holding in the second issue. As held earlier on, the plaintiffs' right of ownership solely hinges on their ability to prove ownership of the suit land the duty they have definitely failed to discharge. Having held that the plaintiffs are not lawful owners of the suit land, it follows that the defendant could not have trespassed in the land she owns. Again, issue number three is answered in the negative.

In the upshot of the foregoing, it is my considered view that the plaintiffs' claims have not been proved to warrant the granting of the prayers sought. The plaintiffs are declared trespassers in the suit land. They are therefore ordered to vacate from the suit land. Compensation of Tshs. 420,000,000/= has not been proved by the defendant. It is eventually not granted.

Finally, the suit is accordingly dismissed in its entirety, with costs.

It is ordered accordingly.

Dated at **SONGEA** this 21st day of March, 2024

J. M. KARAYEMAHA
JUDGE