IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

LAND CASE NO. 21 OF 2017

TILIAS SIMEL LAIZER ..... 1st PLAINTIFF

OLODI SIMEL LAIZER.....2ND PLAINTIFF

EDWARD SIMEL LAIZER..... 3RD PLAINTIFF

SAIDI SIMEL LAIZER..... 4TH PLAINTIFF

SAMWEL SIMEL LAIZER..... 5TH PLAINTIFF

SAIGILU SIMEL LAIZER..... 6TH PLAINTIFF

VERSUS

JULIUS FANUEL MOLLEL *(Administrator of the Estate of the late FANUEL LOISHOOKI NOAH)*.....DEFENDANT

JUDGMENT

22nd July & 17th September, 2021

MZUNA, J.

Tilias Simel Laizer, Olodi Simel Laizer, Edward Simel Laizer, Said Simel Laizer, Samwel Simel Laizer and Saigilu Simel Laizer herein after referred to as the 1st, 2nd, 3rd, 4th, 5th and 6thplaintiffs respectively, instituted this land case against Fanuel Loishooki Noah. Unfortunately, the said Fanuel Loishooki Noah, the defendant, passed away during the pendency of this case. Mr. Julius Fanuel Mollel, the duly appointed administrator took over the matter on his behalf.

The claim by the plaintiffs is that on 7th March, 2017, the defendant trespassed into their 18 acres' land which was allocated to them inter vivos by their late father Simel Ole Marit Laizer way back in 1985. Each was allocated 3 acres. He destroyed their crops. The reliefs sought by the plaintiffs includes among others:- An order that they are lawful owners of the suit land; That, the intended eviction is misplaced and is not binding against the plaintiffs; An order restraining the defendant and or his agents, servants, workmen from interfering plaintiffs' ownership of the suit land; Payment of specific damages to the tune of Tanzania shillings twenty-five million four hundred and forty thousand (25,440,000/-) as well as General Damages for trespass as may be assessed by this court and costs of the suit.

On the other hand, the defence says that, the suit land which the plaintiffs are claiming is the same land which was adjudicated upon in Civil Case No. 52 of 1993 before the Resident Magistrate's Court and Civil Appeal No. 23 of 2007 in the High Court whereby the legal representative of the Plaintiffs' father Godfrey Ole Marti lost. It had undergone various steps including execution in February, 2016, after their preliminary points of objections were dismissed. He insisted that he is the lawful owner of the suit land.

During the hearing of this case, Mr. Lengai Nelson Merinyo learned counsel appeared for the plaintiffs whereas Mr. Elvaison E. Maro, the learned

counsel represented the defendant. Five issues were drafted and are subject for determination:-

First, whether the land in dispute which was the subject matter in Civil Case No. 52 of 1993 measures 15 acres or 18 acres? Second, whether the land in dispute in this suit is the same as the land subject in dispute in Civil Case No. 52 of 1993? Third, who is the lawful owner of the suit land? Fourth, whether Naseku Ole Marti was an apparent legal Administratrix of the estate of the late Simile Ole Marti at the time of execution? Fifth, to what relief parties are entitled thereto.

Let me start with the first issue as to <u>whether the land in dispute which was the subject matter in Civil Case No. 52 of 1993 measure 15 acres or 18 acres.</u>

It is vividly clear that the plaintiffs did not say anything in regard to size of the land in Civil case No. 52 of 1993. Even Mr. Lengai in his final submission left this issue hanging. Instead tackled the second issue. This is not surprising because they are alleging to have not been part to the said land case. However, the defendant (Julius Fanuel Looshoki Mollel, an administrator of the late Fanuel Loishooki who died when this case was still pending) was quoted to say when examined by Mr. Maro that, in the Resident Magistrate's Court Loishooki Noah (the deceased) was claiming a 15 acres farm locate at Nadosoito, Terati ward (now Muriet) which is bordered by the ravine in the

west side. Exhibit D1 which is the plaint filed in the Resident Magistrate's Court at paragraph 9 clearly states that:-

> *That in January, 1993 the defendant wrongfully trespassed into the plaintiff land and wrongly took possession and cultivated 15 acres therein and caused seasonal crops to be planted on the said 15 acres (henceforth to be referred to as the dispute/ suit land)*

The position of the above testimony is corroborated by the Exhibit D4 which is the judgment of Resident Magistrate's Court of Arusha at Arusha, Civil Case No. 52 of 1993 at paragraph 2 of the 1st page which reads as;

> *Plaintiff Fanuel Loishooki as above stated in his plaint claimed that in January 1993 the Defendant Godfrey Ole Marti wrongfully trespassed into the plaintiff (sic) land and wrongly took possession and cultivated 15 acres threin(sic) and caused seasonal grops (sic) to be planted on the said 15 acres.*

The same evidence was stated by DW2 Samwel S/o Loilole Mollel, who was the Village Chairperson by then. DW2 said that the land of Fanuel Loishooki which the Court Broker (DW3) demarcated was of the size of 15 acres. Therefore, looking at all of those testimonies it is apparent that the land in dispute in the Civil case No. 52 of 1993 measures 15 acres and not otherwise.

Now, I turn to the second issue which is <u>whether the land in dispute in this suit is the same as the land subject in dispute in Civil case No. 52 of 1993?</u>

As we have seen above, the plaintiff's claim that the suit land is measuring 18 acres. They are adding also that every one of them was given 3 acres each by their late father way back in 1985. PW1 when testifying mentioned the boundaries of the suit land as; North the land is boarded by Mr. Nangalayo Kibile, South by Mr. Lemali Kisembe and Lebahati Koiyaki, East by Mr. Fanuel Loishooki Noah and West by their residence. He further argued that he was surprised to see a notice of eviction directed to her mother one Naseku alleging that the shamba belonged to the defendant vide Civil Case No. 52 of 1993 while their mother had never had any case with anyone. Also, when cross examined by Mr. Maro, PW1 said that the 18 acres ends at their residence and at the end there is a Ravine Korongo. PW1 further submitted that he is not aware if his father was issued with an order of injunction not to interfere with the suit land in 1980.

Almost all the remaining plaintiffs (PW2, PW3, PW4, PW5 and PW6) testified the same evidence as that of PW1 including the size and boundaries of the suit land. Mr. Lengai in his final submission argued that the dispute on this issue is on boundaries especially on the Western side. Whereas plaintiffs are alleging to be boarded by their residencies, the defendant is saying that it is demarcated by the ravine. He quoted the testimony of DW when he was narrating on the burial of the plaintiff's father and Naseku his wife in relation to the land where they were buried.

On the side of the defence, DW1 on the issue of the boundaries of the suit land said that; North the land is bordered by Nangalaiyo, in the East by Plaintiffs land, in the South, late Marti Sandamu's land and in the West bordered by the Ravine (Korongo).

He added that, in the South the land of late Marti Sandamu is currently possessed by Lebahati Koyaki and Lemali Kisembe. DW1 went on saying that the reconciliation case between Fanuel Leishooki and Simel Ole Marti was registered as No. 39/1980 and Godfrey Ole Marti did not dispute that fact. Also, he testified that, before filing the case at the Resident Magistrates' court there was only one house resided by Naseku, their mother but in 1998 they built up a new one when the case was still pending. Exhibit D2 which is the letter from the Ward office directed to the Land Reconciliation Board annexed with the sketch map of the land which was in dispute together with demarcations thereto, was tendered and admitted as exhibit D2.

Supporting the evidence of DW1, DW2 who was the Chairperson of the Nadosoito village on the issue of land in dispute testified that; he knows the suit land and he outlined the demarcations thereto as follows:- North Mr. Nangalaiyo Kibile. East: Mr. Fanuel Loshooki Noah, South: Mr. Marti Sandamu and West: A Ravine (Korongo). DW2 further said that at the time of execution, Edward Simel was building a house which was unfinished. It is in the disputed plot which was handled to Loshooki, the defendant. By the time

of handling the disputed land there were three buildings only. He insisted that the plaintiffs had shifted from their plot (Southern) where their father was buried and went to the Western side.

In his submission, Mr. Maro quoted paragraph 17 of the counter claim which stated boundaries as North:- Bordered by Ngalaiye's land, East:- By Plaintiffs' land, South: Late Marti Sandamu's land and; West a ravine. Mr, Maro concluded that the land is the same in both disputes. The learned counsel, discredited the evidence of PW2 Olodi Simel Laizer and warned this court on believing such evidence. To such effect he cited the cases of **Kibwana vs Republic** (1968) HCD 265, **Mohamed Said vs The Republic,** Court of Appeal Criminal Appeal No. 145 of 2017 and **Zakaria Jackson Magaya vs Republic,** Court of Appeal of Tanzania, Criminal Appeal No. 411 of 2018 (both two later cases are unreported). These cases were all about the court disbelieving the evidence of a person who gives inconsistent testimony while under oath. To that effect Mr, Maro was faulting the evidence of PW2 as being inconsistent on boundaries and the dispute on the suit land in Civil Case No. 52 of 1993 and in this case.

Looking at such evidence and testimonies, two salient features in relation to the land in dispute and that which was in dispute in Civil Case No. 25 of 1993 are apparent. **One,** on the size of the suit land. Whereas the plaintiffs are contending that the suit land is 18 acres, the defence side as

well as exhibits D1, D2, D4, and D7 are all indicating that the land in dispute is measuring 15 acres. **Two,** while Plaintiffs are submitting that the suit land on the West is bordered by their residence, the defence and the said exhibits are stressing that on the West the suit land is demarcated by the Ravine (Korongo). All the remaining features are almost the same from the testimony of both sides including the submission of Mr. Lengai.

The position of the law is very clear that in civil cases the party who alleges any fact must prove that "*those facts exist*". The only exception is *"unless it is provided by law that the proof of that fact shall lie on any other person"*, see; Sections 110, 111 and 112 of the Law of Evidence Act [Cap. 6 RE 2019]. I am fortified to this view by the case of **Geita Gold Mining LTD and Managing Diretor GGM v. Ignas Athanas,** Civil Appeal No. 227 of 2017 at Mza, (unreported) which cited with approval the case of **Anthony M. Masanga v. Penina (Mama Mgesi) & Another,** Civil Appeal No. 118 of 2014 (unreported). The Court of Appeal held that;

> *"Let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases/ the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law Evidence Act, Cap. 6 of the Revised Edition, 2002"*

Therefore, in the case at hand the duty of proving that the suit land is different from that which was adjudicated upon in Civil case No. 52 of 1993

lies on the plaintiffs. As well highlighted above, based on the evidence and the tendered exhibits, it remains as a fact that the land in dispute is the same. I say so because even the Court of Resident Magistrate which went to visit the *locus in quo* made an observation which looked at its contents supports the same testimony as that of the defence evidence. Reading Exhibit D3, the court proceedings in Civil Case No. 52 of 1993, the trial Magistrate is quoted to have said:-

GENERAL OBSERVATION FROM THE AREA IN DISPUTE

1) *Western part of the dispute land is stern (sic)... where valley is.*
2) *The old Boma of Simel is out of the disputed land and the new one is..... the disputed land.*
3) *South area is the boundary is partly planted with sisals (sic) trees.*
4) *North part there is sisal and the shamba of Nagaloiya.*

When the witness PW4 Lavuye Loitele, (aged 75 by then in 1998), was cross examined by Mr. Alute Mughwai, advocate (see exhibit D3, the proceedings of Rm's court), he said:- Western side the shamba of Nayaloiyo (sic) goes to the valley.

Such observation by the Magistrate resembles with Exhibit D2 which is the sketch map of the suit land which was referred to the reconciliation Board in Complaint No. 39/1980. The evidence of the defence in the case under consideration (DW1, DW2 and DW3) clearly shows that despite the house which was out of the suit land of the late Simel, PW3 Edward Simel Lazier, built a new one which was still under construction in 1998 when the case was

still pending. Obviously, the said house is what the RMS' court referred to under head two above as "*...and the new one was in.... the disputed land.*"

Going by the above record, the allegation by PW1, PW2, PW3, PW4, PW5 and PW6 that in the West the suit land is bordered by their residence goes to reaffirm that such residence is that which was built by PW3 when the case was pending in the Resident Magistrates' court. I tend to agree, as well stated by DW1, DW2 and DW3 and the defence exhibits (above shown) that the suit land in the West side is demarcated by the Ravine (Korongo). The only logical conclusion is that the said residence was built in order to fool and create another purported boundary (ies) which were not there before the commencement of Civil case No. 52 of 1993. I am also of such settled mind because even the plaintiffs accept that after their residence, there is a valley which has water flowing during rain season. Be it as it may, the question of boundaries surrounding the suit land is settled that, in the West there is a ravine (Korongo) which was the area of dispute. Other parts of the boundaries remain undisputed.

Regarding the issue of 18 acres as opposed to 15 acres, the plaintiffs says actually the claim by the defendant at the Reconciliation Board was for five (5) acres not the 18 acres they are claiming. This is however contradistinguished with the plaint (exhibit D1) which shows, that land was in occupation of the defendant, then the plaintiff in Rm civil case No. 52 of 1993

(see para 6 of exhibit D1). He could not claim his own land. It is noteworthy that the second plaintiff in the present case, testified as PW5 in RM 52 of 1993. One wonders why does he say today that his suit plot was not subject to litigation in the Rm's case while he is quoted to have said that the shamba belonged to his father. He admitted as well that the defendant Godfrey who lost in Rm Civil case No. 52/1993 acted as a leader of their family after death of their father in 1990. He is estopped to deny such fact now. The same logic applies to other plaintiffs as well.

So the difference of 3 acres (18 vs 15 acres) is the same land which is not fit for cultivation, a stony one. It is therefore possible the plaintiffs included it in the suit land and enlarged the acres to 18. It must be borne in mind however that, that unfertile land is not in dispute and no one between the parties refer on it perhaps due to its infertility. In the event therefore, I agree with Maro and the defence side that the suit land in both this case and Civil Case No. 52 of 1993 is one and the same.

The question which follows is *whether this suit is res judicata to civil case No. 52 of 1993?* Section 9 of the Civil Procedure Code [Cap. 33 RE 2019] provides an answer. It reads;

> *9. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue*

has been subsequently raised and has been heard and finally decided by such court.

This provision of the law prohibits a court to try a suit or matter which has been decided and concluded in the court with competent jurisdiction based on the same parties litigating under the same title. It was held in the case of **Gerald Chuchuba vs. Rector, Itaga Seminary** [2012] TLR 213 on the plea of Res judicata, that;

"Before the doctrine of res judicata is applied the following essential elements must be shown to exist: that the judicial decision was pronounced by a court of competent jurisdiction, that the subject matter and the issues decided are substantially the same as the issue in in the subsequent suit, that the judicial decision was final and that it was under the same parties litigating under the same title."

See also the cases of **Bandugu Ginning Co. LTD vs CRDB Bank PLC and 2 others**, Civil Appeal No. 265 of 2019 CAT at Mwanza (unreported).

The historical background shows there is a case which the same parties were litigating under the same title as the present case. It was decided to its finality by a competent court. The case in point is Civil Case No. 52 of 1993 and the suit land was declared to belong to the defendant. Godfrey Ole Marti was dissatisfied and appealed unsuccessfully to this Court vide Land Appeal No. 23 of 2007. The case was between the defendant Fanuel Loishooki Noah against Godfrey Ole Marti on the same suit land. It was tried to its finally. If at all the plaintiffs and the said Godfrey Ole Marti felt aggrieved, ought to have

appealed to the Court of Appeal instead of reinstituting a fresh case. They are barred to do so.

Issue of non-joinder of the plaintiffs was raised in the Resident Magistrate court as a preliminary objection but in vain, just like in the High court. The reason for dismissing their objection was quite apparent that the family of the late Simel, the plaintiffs inclusive, were aware of the suit in court. The views which I fully subscribe to. I say so because among the plaintiffs Olodi Simel (PW2) according to Exhibit D3 (the court proceedings) testified in support of Godfrey Ole Marti, as well submitted by Mr. Maro. PW2 showed clearly to have the knowledge of the dispute since 1980 when the matter was referred to the Land Reconciliation Board through Registration No. 39/1980 between the defendant and his father when the injunction order of not interfering the suit land (by then 5 acres) was issued. Moreover, the question of Godfrey Ole Marti being an administrator of the deceased's estate was also discussed and decided upon by the Resident Magistrate's Court and upheld by this Court during appeal.

At page 7 paragraph 2 line 5 of the judgment of the Resident Magistrates' court it was written;

> *"For the reasons I am satisfied that, the appointment of Godfrey Ole Marti as spokesman and administrator of the estate of Simel Ole Marti Sandamu is valid per Arusha (tribe) customs. And therefore (sic) he has a locus standi to sue on behalf of the clan members, as an administrator of the estate of the deceased..."*

The same words were quoted by this Court during appeal at page 18 of its judgment (Civil Appeal No. 23 of 2007) that;

> *... so long as this finding has not been appealed against, it is binding and it represents the appellant's position before the trial court. Taking that into consideration, the appellant and/or his advocate cannot be heard now to say that the family of the late Simel Ole Marti was not heard and/or was a stranger to the court proceedings in Civil case No. 52 of 1993. The reason is clear that they were heard through the appellant as the administrator of the late Simel Ole marti."*

That being the case, issue of ownership of the suit land had already been conclusively determined by the Court. Therefore, regarding that argument, I find the cases cited by Mr. Lengai on the issue of Administration of the deceased's estate which are of **Mohamed Hassan vs Mayasa Mzee and Mwnahama Mzee** [1994] TLR 225 and **Omoke Oloo vs Werema Magira** [1994] TLR 144 are distinguishable to the case under consideration. To say otherwise is as if this court is sitting as if it is a Court of Appeal, something which is unheard of! The plaintiffs cannot therefore be allowed to pass the back door of the Court and bring again the same matter for determination. That said, the third issue is also determined in favour of the defendant.

This takes me to another issue as to <u>whether Naseku Ole Marti was an apparent legal administratrix of the estate of the late Simel Ole Marti at the time of execution?</u>

It is crystal clear that this issue emanates from the execution order on the application for execution of the decree in Civil Case No. 52 of 1993

(Exhibit D8). The application was to seek vacant possession from Naseku Ole Marti who was occupying the suit land by then following the death of Godfrey Ole Marti. The plaintiffs unsuccessfully filed objection proceeding in the Resident Magistrate's Court vide Application No. 15 of 2016 contesting the eviction order issued to their mother Naseku Ole Marti. Naseku Ole Marti who was by then in occupation of the suit land, the property subject for execution.

This issue of whether Naseku Ole Marti was an apparent legal administratrix of the estate of the late Simel Ole Marti at the time of execution was supposed to be discussed and determined in the application for execution. No further remedies were sought after the application No. 15 of 2016 on objection proceedings met a snagging block. Godfrey Ole Marti, the elder brother of their father/uncle (now deceased) during hearing of the Rm Civil case No 52 of 1993 as well as Appeal No. 23 of 1997, assumed the role of an administrator of the deceased Simel Ole Marti who was the husband of Naseku Ole Marti. As correctly argued by Mr. Maro, this issue in the circumstances of this case, having found that this case is *res judicata*, is out of context. It is bound to fail.

For the above stated reasons, the claim by the plaintiffs for compensation for the alleged trespass and destruction of maize, beans and 'ngwala' to the tune of Tshs 25,440,000/- is bound to fail. One of the defences for trespass is

possession. I am fortified to this view by Clerk & Lindsell ON TORTS, 18th ed. 2000 at p. 923 paragraph 18.01 defines the term "*trespass to land*"–

> ***"Trespass to land consists in any unjustifiable intrusion by one person upon land in possession of another."*** *(Emphasis mine).*
>
> *(Quoted by Masati, J (as he then was) in Commercial Case No. 64 OF 2005, High Court DSM, unreported, between* ***Alliance Media (T) LTD vs. A1 Outdoor Tanzania LTD and three Others).***

Possession has not been proved, like wise trespass has not been proved to the required standard of proof. This suit is hereby dismissed with costs.

M. G. MZUNA,

JUDGE.

17,th September, 2021.