

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND CASE No. 12 OF 2022

MIRIAM JEREMIA SOLOMON.....PLAINTIFF

VERSUS

ZARAMO REAL LIMITED.....1ST DEFENDANT

ALLY AZIM DEWJI.....2nd DEFENDANT

HUSSEIN AZIM DEWJI.....3RD DEFENDANT

COMMISSIONER FOR LANDS.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

11th September 2023 & 2nd October 2023

L. HEMED, J.

The instantaneous suit is on trespass to land. The plaintiff herein who is the administratrix of the estate of the late Jeremiah Solomon Sumari is suing the defendants for having trespassed into part of the unsurveyed land measuring more than seven (7) acres located at Amani - Gomvu, Kigamboni. It was alleged that, the late Jeremiah Solomon Sumari, acquired the suit land in 1992.

Upon the plaintiff becoming the administratrix of the estate, she took initiatives to survey the land. When the survey was done in the year 2015, for purposes of creating Plot No. 589 Block 'A' Amani Gomvu - Kigamboni she was informed that part of the land was already surveyed. Having unsuccessfully complained to the Ministry of Lands and Human Settlements Development she called the surveyor to ascertain the size of land that was encroached and found that the 1st defendant had surveyed its land including part of the plaintiff's land measuring 4134 square Meters, equivalent to one acre. Having conducted official search, she later discovered that the 2nd and 3rd defendants were the ones in possession of the suit land. She thus lodged the present suit joining the 4th and 5th defendants who she found to be necessary parties to the proceedings at hand. The plaintiff is thus praying for judgment and decree against the defendants as follows:-

"a) A declaration that the Plaintiff is the lawful owner of the land in dispute since in 1992, under a deemed right of occupancy;

b) A declaration that a holder of a deemed right of occupancy does not automatically become a squatter once an area is declared a planning area;

c) An order that the 1st Defendant is a trespasser over the disputed land without any colour of right over the real property;

d) An order for eviction of the Defendant's fraudulently obtained certificate of right of occupancy over the land in dispute granted to the 1st Defendant;

e) The 2nd and 3rd Defendants are trespassers over the disputed land for obtaining the same title which was tainted by illegalities from the 1st Defendant;

f) The granted right of occupancy fraudulently granted to the 1st Defendant and transferred to the 2nd and 3rd Defendants be revoked by the 4th Defendant; as the grant was of no effect in law;...

g) An order for perpetual injunction against the defendants, their agents, assignees, workmen or other third parties related to or over real property/the land in dispute;

h) Costs of this suit be granted to the Plaintiff; and

i) Any other order the honourable court may deem fit and just to grant."

The defendants disputed all the claims. The 1st, 2nd and 3rd defendants in their joint written statement of defence, rebutted the claims

of ownership by the Plaintiff and briefly stated that the suit piece of land is part of the land described as Plot No.10 Block B Amani Gomvu – Kigamboni, under Certificate of Title No.91450, registered in the name of the 1st defendant. In their part, the 4th and 5th defendants generally stated that the 4th Defendant legally granted the certificate of Right of Occupancy over Plot No.10 Block B at Amani Gomvu in Kigamboni District to the 1st Defendant who proved to be the owner of the said plot before it was surveyed.

When the matter was called for final pre-trial conference, the following issues were framed to guide the trial and final determination of the dispute:-

1. Whether the suit piece of land measuring 4134 SQM is part of the land owned by the Plaintiff.
2. Whether the inclusion of the suit piece of land in the Plot No.589, Block "A" Amani Gomvu was lawful.
3. To what reliefs are the parties entitled.

During hearing of the matter, the plaintiff called three (3) witnesses, Miriam Jeremiah Solomon who testified as PW1, Henrik Mathius Lwanga

(PW2) and Said Bakari Kisoma who gave evidence as PW3. The plaintiff's case had 14 exhibits which were as follows:-

- i. Grant of letters of Administration to MIRIAM JEREMIAH SOLOMON in Probate and Administration Cause No.24 of 2012 (exhibit 'P1').
- ii. A letter dated 16/9/92 from CCM Office Amani Gomvu, addressed to Jeremia Soromoni with a subject matter "...KUKUANDAA KIKAO CHA PAMOJA NA WANAKIJIJI WAISHIO JIJINI DAR ES SALAMM".
- iii. Exhibit 'P3', a letter Somangila Ward Office addressed to J. SOLOMON, KUMB/NA/SOMA/K.KATA/1/27 with a title "YAH: UJENZI WA POLIS POST".
- iv. Exhibit 'P4', another letter from the Chairman of Street Council of Mbutu Kichangani dated 28/2/2005 addressed to J. Solomon with a title "YAH: UJENZI WA OFISI YA MTAA YENYE THAMAN YA TSHS. 5,040,000".
- v. Exhibit 'P5' acknowledgment of receipt of Tshs 35,000/= by one Juma S. Mtitu to supply some building materials of "8.3.93"
- vi. Exhibit 'P6' is the Assets Declaration Form for Public Leaders of one Jeremiah Solomon Sumari for the year 2006.

- vii. Exhibit 'P7' a letter of MIRIAM JEREMIAH SOLOMON to the Permanent Secretary, Ministry for Lands, Housing and Human Settlement Development, dated 09/03/2015, titled "YAH: TAARIFA KUHUSU SHAMBA AMANI GOMVU-MBUTU KICHANGANI"
- viii. Exhibit 'P8', a letter by MIRIAM JEREMIA SOLOMON to the Permanent Secretary, Ministry of Lands, Housing and Human Settlement Developments, dated 23/04/2015, with a title, "YAH: UFUATILIAJI WA UPIMAJI WA SHAMBA MBUTU – KICHANGANI".
- ix. Exhibit 'P9', a complain letter by Miriam Jeremiah Solomon to "Mwenyekiti mtendaji" (not dated" with a title, "Yah: kuchongwa barabara katikati ya shamba langu"
- x. Exhibit 'P10", minutes of "KIKAO CHA MIPAKA YA KIWANJA CHA AMANI GOMVU" dated 08/04/2021.
- xi. Exhibit 'P11', A copy of Certificate of Occupancy for Plot No.10 Block 'B' Amani Gomvu Area in Temeke Municipality allocated to ZARAMO REAL LIMITED.
- xii. Exhibit 'P12', is the Official Search Report for Plot No. 10 Block 'B' Amani Gomvu Area, Temeke Municipality, dated 17.08.2022

showing registered owners as ALLY AZIM DEWJI and HUSSEIN AZIM DEWJI.

xiii. Exhibit 'P13' is the unregistered survey plan for unspecified piece of land.

xiv. Exhibit 'P14' Cadastral Survey Report by Landtek Limited on the suit piece of land, boundary verification report.

The defendants paraded a total of four (4) witnesses who were; Ally Azim Dewji (DW1), Salim Abdalah Zaggara (DW2), Jafari Misong'ombe (DW3) and Kajesa Minga (DW4). The defence witnesses tendered only one (1) exhibit which was:-

1. Exhibit 'D1', a letter by the Director Temeke Municipal Council to Commissioner for Lands, dated 07/06/2011, Reference No. LD/TM/AGV/17642/7MHKH, titled, "YAH: KIWANJA NA.10 KITALU 'B' AMANI GOMVU JIJINI DAR ES SALAAM".

Let me start with the 1st issue, whether the suit piece of land measuring 4134 SQM is part of the land owned by the Plaintiff. I must clearly state at the outset that in order to prove trespass to the suit piece of land, the plaintiff has to prove that she owns the same. It is also a fact

that the suit piece of land forms part of Plot No.10 Block 'B' Amani - Gomvu, Temeke Municipality, which, according to exhibits P11, P12 and D1, is owned by the 2nd and 3rd defendants. The plaintiff who is the administratrix of the estate of the late Jeremiah Solomon Sumari claims it to be part of her land. This is what the plaintiff ought to prove! I am holding so because the duty to prove rests on the person who alleges pursuant to section 110(1) of the Evidence Act, [Cap.6 R.E 2019] which provides thus:-

"110(1) whoever desire any court to give judgment as to any legal right or liability depends on existence of facts which he asserts must prove those facts exists."

In order to prove the alleged encroachment, the plaintiff was duty bound to prove the size of her piece of land alleged to be encroached by the defendants. In the amended Plaint, the plaintiff pleaded in paragraph 13 thus:

*"13. That the plaintiff being part and resident of Amani-Gomvu Village, upon acquiring the land in dispute which was **more than seven acres**, and upon making unexhausted improvements over the*

land in dispute in collaboration with Aman-Gomvu villagers, participated and has been participating in various village development projects...” (Emphasis added)

From the quoted above paragraph of the Plaint, the Plaintiff was to prove that her land was more than seven (7) acres so that to establish the alleged encroachment. This is pursuant to the principle that parties and courts are bound by the pleadings as was observed by the Court of Appeal of Tanzania in **Musaka Mussa vs Rogers Andre and 2 others**, Civil Appeal No.497 of 2021, that:-

*"It is also our observation that it is not only the **parties who are bound by their pleadings**, but the courts are also bound by the said pleadings of the parties. As it is for the parties to the suits, who are not allowed to depart from their pleadings and set up new cases, courts are also bound by the parties' pleadings, and they are not allowed to depart from such pleadings...”*

The plaintiff who testified as PW1 told the court that, the size of her entire piece of land was seven (7) acres. In trying to prove her statements, she produced several letters which were admitted into

evidence. The letters included, the letter dated 16/9/92 from CCM Office - Amani Gomvu, addressed to 'Jeremia Soromoni' with a subject matter "...KUKUANDAA KIKAO CHA PAMOJA NA WANAKIJIJI WAISHIO JIJINI DAR ES SALAMM" (exhibit 'P2'); a letter by Somangila Ward Office, addressed to J. SOLOMON, KUMB/NA/SOMA/K.KATA/1/27 with a title "YAH: UJENZI WA POLIS POST" (Exhibit 'P3'); and a letter from the Chairman of Street Council of Mbutu Kichangani, dated 28/2/2005 addressed to 'J.Solomon' with a title "YAH: UJENZI WA OFISI YA MTAA YENYE THAMAN YA TSHS. 5,040,000" (exhibit 'P4'). In the course of reading the said letters, I found them showing the engagement of one JEREMIAH SOLOMON in several activities as a member of the village of Amani Gomvu. The said letters however, do not establish on the how the late Jeremiah Solomon Sumari acquired the land nor do they establish the size of the said piece of land.

The only document which was tendered by PW1 (the plaintiff) to prove the size of the land is exhibit 'P6', the Assets Declaration Form for Public Leaders made by one Jeremiah Solomon Sumari in the year 2006. In the said Assets Declaration Form, the late Jeremiah Solomon Sumari, declared at page 3 to have two farms, one at Gezaulole whose size was 1.396 hectares and another at Mbutu whose size is 1.00 hectare. From what the

plaintiff's witnesses have stated, the Farm at Mbutu is the one which is alleged to have been encroached.

Assets Declaration Form for Public leaders is made under oath and therefore what is contained therein is believed to be the correct one. The late Jeremiah Solomon Sumari declared in the year 2006 that his land at Mbutu was 1 hectare in size. It is understood that one hectare has 10000 square metres while 1 acre is equal to 4046.86 square meters. If 10000 square meters are divided by **4046.86** square meters, the result thereof is **2.4710516302**, equivalent to 2.5 acres. Therefore, according to the assets declaration Form, the late Jeremiah Solomon Sumari, had approximately **2.5 acres** and not more than 7 acres as pleaded and asserted by the plaintiff (PW1).

In **Godfrey Sayi vs Anna Siame as legal representative of the late Mary Mndolwa**, Civil Appeal No.114 of 2014, the Court of Appeal of Tanzania stated that:-

"It is a principle of law that, generally in civil cases, the burden of proof lies on the party who alleges anything in his favour."

The plaintiff attempted to prove encroachment without, first establishing the size of the land she owns. In proving the alleged encroachment of 4134 Square Meters, the plaintiff use exhibit 'P14', the cadastral survey report for verification of boundaries which was prepared by Landtek Limited, the geophysical and land survey service providers. Exhibit P14 was tendered by PW2 who testified that while working with the LANDTEK LIMITED, in June, 2020, they were approached by PW1 to conduct survey on her land located at Amani Gomvu. He testified that during the survey process all neighbours were involved save for the owners of Plot No.10 Block "B" Amani Gomvu Area. At the end he prepared exhibit P13 and P14 to prove the boundaries. When he was cross examined, PW2 stated that exhibit P.14 and 13 were not final were not signed.

I am of the settled view that the cadastral report could not establish the encroachment of the alleged 4134 square meters because it is on record that the piece of land alleged to belong to the plaintiff is not surveyed. Cadastral survey could only be useful to establish the extent of encroachment only if the land of the plaintiff could be surveyed. Additionally, exhibit P13 and P14 do not qualify in law to prove the correctness of the location and size of the land for want of approval by the

Chief Surveyor (Director of Survey and Mapping). I am holding so because it is the requirement under section 18 of the Land Survey Act, [Cap.324 RE 202] cadastral survey to be approved by the chief surveyor. It provides thus:

*"Without prejudice to the provisions of the law relating to evidence, a plan based on general cadastral survey and **approved as such by the Chief Surveyor** shall be prima facie evidence of the correctness of the position of the boundaries shown."* (Emphasis Added).

The fact that the cadastral Report does not have the approval of the Chief Surveyor, it cannot be relied upon. I must clearly state right here that prove of the size or boundaries of unsurveyed land is not by way of cadastral survey report. Boundaries and or size of unsurveyed land can only be checked and verified through the marks or size stated in the Sale Agreement or any document used to transfer such customary right of occupancy.

From the foregoing, I find that the Plaintiff has failed to prove the alleged encroachment of the piece of land measuring 4138 square meters. The 1st issues is thus answered in the negative.

The 2nd Issue was on whether the inclusion of the suit piece of land measuring 4138 sqm into Plot No. 589 Block 'A' Amani- Gomvu Kigamboni was lawful. In the first place, it must be noted that Plot No.589 Block 'A' Amani- Gomvu Kigamboni, though pleaded in the Plaint by the Plaintiff, it does not exist. The said Plot has also been stated on the cover page of the draft cadastral survey report (exhibit P14). The said 'Plot No.589 Block 'A' Amani- Gomvu' is in a proposed number for the plaintiff land which was intended to be surveyed. To make story short, that plot does not exist. I am saying so because a recognised surveyed Plot must be in an approved and registered Survey Plan. In the matter at hand, the plaintiff did not tender the approved survey Plan for Plot No.589 Block 'A' Amani-Gomvu, Kigamboni.

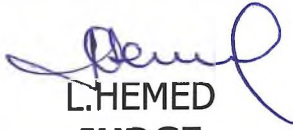
I am aware that the plaintiff included the suit piece of land measuring 4134 sqm in her proposed Plot No.589 Block 'B' Amani-Gomvu (exhibits 'P13' and 'P14'). However, the said piece of land is part of the existing Plot No.10 Block 'B' Amani-Gomvu. The fact that the Plaintiff failed to prove ownership or encroachment of the defendants into the suit piece of land, then this issue collapses. In **Ikizu Secondary School vs Sarawe Village Council**, Civil Appeal No.163 of 2016, the Court of Appeal of

Tanzania pointed out that if one fails to show proof of ownership then other grounds or issues automatically crushes. Therefore, having failed to prove the size of her land and the extent of encroachment by the defendants, the plaintiff is not entitled to claim the suit piece of land.

The last issue is on the reliefs the parties are entitled. I am of the firm view that, having failed to prove her case, the plaintiff is not entitled to any relief claimed. The entire suit deserves to be dismissed. I hereby dismiss the entire suit. Each party to bear its own costs. It is so ordered.

DATED at DAR ES SALAAM this 2nd October 2023.




L. HEMED
JUDGE