IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWANGESI, J.A., NDIKA, J.A., And KITUSI, J.A.)

CIVIL APPEAL NO. 246 OF 2017

DIRECTOR MOSHI MUNICIPAL COUNCIL ..... APPELLANT

VERSUS

1. **STANLENARD MNESI**
2. **ROISIEPEACE SOSPETER ..... RESPONDENTS**

(Appeal from the Judgment and Decree of the High Court of Tanzania at Moshi)

(Sumari, J.)

dated the 16th day of June, 2016
in
Land Appeal No. 12 of 2014
.....

RULING OF THE COURT

(CORRECTION OF THE JUDGMENT OF THE COURT UNDER RULE 42(1) & (2) OF THE TANZANIA COURT OF APPEAL RULES, 2009.)

NDIKA, J.A.:

Stanlernad Mnesi and Roisiepeace Sospeter emerged winners in the District Land and Housing Tribunal of Moshi, in Land Case No. 154/2014 against the Director Moshi Municipal Council Appeal to the High Court was unsuccessful hence and Appeal No. 246 of 2017 in this Court.

In the judgement delivered to the parties on 10th April, 2019. It inadvertently referred the presiding Justice Hon. S.S. Mwangesi as the 'Chief Justice' instead of 'Justice of Appeal.' The title read:

"S.S. MWANGESI
CHIEF JUSTICE

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL"

In order to remove any confusion which may result from improper titling of the Justices of Appeal, we on our own volition invoke Rule 42 (1) and 2 of the Tanzania Court of Appeal Rules, 2009 as amended and correct the title of the presiding Justice of Appeal Hon. S. S. Mwangesi which shall now read:

"S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL"

We further direct the Registrar to immediately issue the corrected version of the judgment and the ruling of the Court to the parties.

It is so ordered accordingly.

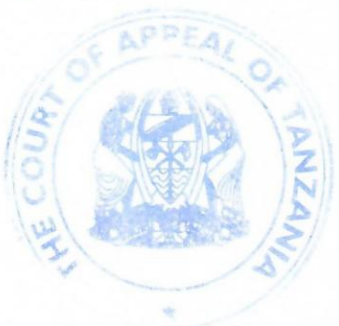
DATED at **DAR ES SALAAM** this 30th day of April, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL

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(Appeal from the Judgment and Decree of the High Court of Tanzania at Moshi)

(Sumari, J.)

dated the 16th day of June, 2016
in
Land Appeal No. 12 of 2014

.....

JUDGMENT OF THE COURT

8th & 12th April, 2019

NDIKA, J.A.:

Stanlenard Mnesi and Roisiepeace Sospeter, the respondents herein, are husband and wife. They jointly sued the appellant, a local authority established under the Local Government (Urban Authorities) Act, Cap. 288 RE 2002, in the District Land and Housing Tribunal of Moshi District in Land Case No. 154 of 2014 claiming, *inter alia*, ownership of a certain piece of land and compensation for demolition of a portion of the structure that stood

on that land. The trial tribunal entered judgment for the respondents whom it adjudged lawful owners of the suit property and awarded them compensation in the sum of TZS. 10,000,000.00 as damages for the demolition complained of. The appellant's first appeal to the High Court sitting at Moshi (Sumari, J.) was barren of fruit, hence this appeal.

The abridged background facts of the case are as follows: the respondents were joint owners of landed property known as Plot No. PS, Block 7/1, Kilimani, Pasua, Moshi Municipality. In 2007, they bought from a certain Haji Abdallah Mgwandu an adjoining unsurveyed piece of land measuring 13 by 2 metres, now the subject of the present dispute. The sale agreement evidencing that transaction was admitted as Exhibit P.1. Their claim of title to the said disputed land and that it was unsurveyed at the time the dispute ensued dovetailed with the accounts given by two local functionaries, PW2 Fatuma Selemani Mrindoko and PW3 Nuhu Ally Koshuma.

Sometime in 2012, the respondents started effecting construction works on the disputed land. While the works were ongoing, the appellant's officials led by DW1 Kimaro Niki, the appellant's Inspector of Buildings, visited the site and claimed that the structure under construction had obstructed a planned access road. A short while later, the second respondent

was served by the appellant with a notice dated 29th June, 2012 (Exhibit D.2) to flatten within thirty days a portion of the building that allegedly impeded the planned access road by about one metre. The said notice claimed that the said works were being executed contrary to an approved and registered Town Plan No. MM/MISC/610104 of 12th March, 2004 (Exhibit D.5). In response, the second respondent wrote the appellant a letter dated 3rd July, 2012 (Exhibit P.2) resisting the ordered demolition. In that letter, she attacked the legitimacy and validity of Exhibit D.5, contending that the plan was developed and approved without local involvement.

Subsequently, the appellant responded to the second respondent's letter (Exhibit P.2) by serving her a seven days' notice dated 20th September, 2012 (Exhibit D.3) to demolish the aberrant portion of the building. We find it apt to excerpt the operative part of the said notice as hereunder:

> "... imebainika bayana kupitia barua yenye Kumb. Na. CB.49/134/01/55 ya tarehe 27/08/2012 kwa mara nyingine umejenga kwenye eneo la barabara kwa kuingiza jengo lako kwa mita 1 na hivyo kuzuia njia ya wenye viwanja 565 – 567/Kitalu A/ Sehemu V, Pasua kufuatana na Mchoro wa Upimaji Nambari E'5 245/28. Pamoja na viwanja hivyo umewazibia njia jirani zako wawili akiwemo Ndg. Cleopa K. Msuya ambaye ameshindwa kupitisha vifaa vya ujenzi kwa muda mrefu sasa.

(3) Kutokana na hali hiyo, unapewa siku saba (7) kuanzia tarehe ya barua hii ili uwe umebomoa mita moja (1) ya jengo lako iliyoingia kwenye barabara la sivyo Halmashauri ya Manispaa itachukua hatua ya ubomoaji wa eneo hilo na kukutumia gharama za ubomoaji ili uweze kulipa fidia hiyo."

The respondents paid no heed to the above notice. True to its word, the appellant went ahead and pulled down the offending part of the structure on 4th October, 2012, about seven days after the notice had elapsed.

In his testimony, DW1 told the trial tribunal that apart from the respondents' construction works having blocked a planned access road, they were being effected without any building permit. He was firm that the absence of the permit rendered all the developments on the disputed land unlawful and hence, liable to demolition even if the said land was unsurveyed. His account correlated in material terms with the testimonies of two other witnesses for the appellant – DW2 Michael Salim Madinga, the Ward Executive Officer for Boma Mbuzi Ward, and DW3 Suleiman Mwikalo, the Municipal Land Surveyor.

In its decision, the trial tribunal found that the suit property was unsurveyed and proceeded to declare the respondents the lawful owners of the disputed land. In the premises, the tribunal held the appellant liable for

compensation and costs of the suit for demolishing a part of the respondents' building unlawfully. The holding reads thus:

> *"The demolishing of the suit property by the respondent [now appellant] was* ***unlawful because the building of the applicants [now respondents] is attached to the unsurveyed land*** *.... There was no evidence that the construction done by the applicants encroached any road to block other land users to access their residential houses.* ***As the applicants' land was unsurveyed one the respondent had no probable cause to demolish the suit property.*** *It goes, therefore, without saying that the applicants deserve to be compensated.* ***Unfortunate (sic) the stated specific damages of TShs. 27,000,000.00 by the applicants is (sic) not based on any research.*** *I therefore assess and award the applicants TShs. 10,000,000.00 (Ten Million Shillings)* ***as damages suffered for the demolition.*** *"*[Emphasis added]

Against the above decision, the appellant appealed to the High Court at Moshi upon a four-point Memorandum of Appeal. The thrust of the appeal was that the trial tribunal erred: **first**, by holding that the respondents' building had not blocked a planned access road; **secondly**, by finding that

the disputed land being unsurveyed, the demolition of the allegedly encroaching structure was both unpermitted and unlawful; and **finally**, by awarding TZS. 10,000,000.00 as compensation without any legal basis.

As her judgment dated 16th June, 2016 bears out, the learned appellate Judge was wholly impressed by the findings of the trial tribunal. In her reasoning, she made reference to sections 62 and 63 of Cap. 288 (*supra*) and Regulations 124 and 139 of the Local Government (Urban Authorities) (Development Control) Regulations, 2008 (**the Regulations**) made under Cap. 288 (*supra*), all of which were cited to her by the appellant's counsel. On whether a building permit is required for any development of an unsurveyed land, she made a specific reference to Regulation 124 (1) and held that:

> *"It is my considered view that the cited provision of the law above* ***does specify the applicability of the building permit only in the areas which are surveyed****. The fact that* ***the disputed plot is not surveyed is clear and that the issue of obtaining a building permit cannot apply at all.*** *The argument by Mr. Nyoni, learned advocate, that the respondents were supposed to obtain a building permit regardless of their plot being unsurveyed, as*

provided under sections 62 and 63 of the Local Government Act, Cap. 288 and its Regulations of 2008 with due respect is unfounded." [Emphasis added]

In conclusion, the learned appellate Judge endorsed the trial tribunal's finding that the respondents were the lawful owners of the disputed land and that the appellant unlawfully demolished the part of the building that allegedly encroached upon a planned access road.

The learned appellate Judge, too, validated the award of damages as she took the view that:

> *"... it is not disputed that the appellant demolished a part of the respondents' building upon the allegation that [it] encroached the road.* ***I also agree that the respondents did not bring any evidence proving such a loss****. It is, however, a true fact that the respondents' property was demolished and indeed suffered loss. That being the case,* ***the trial tribunal rightly accessed (sic) the extent of the loss and awarded Ten Million Tanzanian Shillings*** *out of ... 27 Million claimed, as damages suffered for the demolition."* [Emphasis added]

Being unhappy with the High Court's decision, the appellant lodged this appeal on two grounds as follows:

> *"1. That the Honourable Judge erred in law by holding that the requirement of applying for a building permit is only for areas that are surveyed leaving alone those not surveyed that are in township authority or in a master planned area.*
>
> *2. That the Honourable Judge erred in law by awarding compensation to the respondents amounting to TShs. 10,000,000.00 without a base."*

On the first ground of appeal, Mr. Deodatus Nyoni, learned Solicitor, who also appeared at the trial and before the High Court, contends that the disputed land is located in Pasua, a part of a planning area being developed according to the Master Plan (Exhibit D.5); that the said land, whether surveyed or unsurveyed, could not be legally developed without a planning consent and a building permit being sought and obtained from the appellant as the authority.

Elaborating, the learned Solicitor submitted that a planning consent is a mandatory requirement under section 29 (1) of the Urban Planning Act, 2007 – Act No. 8 of 2007 (**the Act**) while a building permit is a prerequisite under Regulation 124 (1) of the Regulations. Regulation 139 (1) (a) and (2),

he added, empowers the planning authority to require any person who breaches the building permit requirement to take remedial action by demolishing, removing or altering the offending developments. Non-compliance with such an order, would trigger the authority's power to enter upon the premises concerned and carry out itself such demolition or removal or alteration.

Thus, Mr. Nyoni urges us to find that the appellant's act of demolishing a part of the respondent's building that encroached upon a planned access road was done within the confines of the law for being erected without any authorisation in form of a building permit.

For the respondents, Mr. Martin Rwehumbiza, learned counsel, counters that the disputed area, being a piece of an unsurveyed land, was not subject to a building permit even though it is located in an urban area. He disputes that Exhibit D.5 was a Master Plan but a proposed plan for upgrading squatter settlement in Pasua. Making reference to various provisions of the Act, he argues that the provisions of Cap. 288 (*supra*) and the Regulations are inapplicable to any area declared a planning area under the former Act. To support this proposition, he cites this Court's decision in **Fatuma Awadh Said El Hind v. Salima Ali** [1987] TLR 156 that construed

the now repealed Town and Country Planning Act, Cap. 355 (the TCPA). The learned counsel adds that, since the disputed land is unsurveyed and that no Government Notices were tendered at the trial to establish that a general planning scheme covering the suit property was ever published in the Gazette, there was no justification for the demolition carried out by the appellant.

To begin with, we wish to remark that even though Mr. Rwehumbiza is right that no proof was tendered at the trial that the disputed area lies within the precincts of a general planning scheme, we take judicial notice from **the Town and Country Planning (Planning Areas) Order, Government Notice No. 607 of 1994** that Pasua in Moshi Municipality is one of the areas that were declared planning areas for the purposes of the now repealed TCPA. In terms of section 35 of the TCPA, once an area is declared a planning area any development of land within it becomes subject to a planning consent from the relevant planning authority. To be sure, following the repeal and replacement of the TCPA by the Act in 2007, the above prohibition has been re-enacted under section 29 (1) of the Act thus:

> *"Notwithstanding any other written law to the contrary,* ***no person shall develop any land within a planning area without planning***

consent *granted by the planning authority or otherwise than in accordance with the planning consent and any condition specified therein."*

On a plain and natural meaning, the term "land" referred to above, would in our view, include any land, whether surveyed or unsurveyed as long as it lies within the planning area. We say so as we are guided by section 2 of the Act which defines "land" rather generically by referencing to its definition under the Land Act, Cap. 113 RE 2002 that land "includes the surface of the earth and the earth below the surface and all substances other than minerals or petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to or under land and land covered by water."

Furthermore, in terms of section 7 (1) of the Act, the appellant, as a local authority, is the planning authority for the purposes of the Act for its area of jurisdiction. As such, it has power under section 28 (a) of the Act to "control the use of land, development of land and buildings in the interests of proper and orderly development of the planning area." Under section 28 (d), it is empowered to "consider and approve all applications for consent to develop land and to grant the same." In addition, section 74 (1) of the Act vests the planning authority with enforcement power to deal with any person

carrying out development of land within any planning area without a planning consent by serving him an enforcement notice. In particular, section 74 (2) provides that:

> *"An enforcement notice under subsection (1), shall specify the* ***development alleged to have been carried out without planning consent****, or the conditions of the planning consent alleged to have been contravened and* ***such measures as may be required to be taken by the landholder within the period specified in the notice not less than one month to restore the land to its original condition before the development took place,*** *or for securing compliance with those conditions, as the case may be, at the expense of the landholder or occupier, and* ***such enforcement notice may require the landholder to demolish, alter or pull down and remove any works, buildings or to discontinue use of land.****"*[Emphasis added]

Besides its powers under the Act as a planning authority, the appellant is vested with powers under the Regulations for the control of development within its area of jurisdiction. In particular, as a local government authority it oversees building construction for which Regulation 124 (1) imposes a prohibition thus:

"No person shall ***erect or begin to erect any building*** *until he has –*

(a) made an application to the Authority upon the form prescribed in the Fourth Schedule to be obtained from the authority;

(b) furnished the Authority with the drawings and other documents specified in the following Regulations;

(c) ***obtained from the Authority a written permit to be called a 'building permit.'"***

Regulation 2 defines the term "to erect a building" so broadly to include construction of a new building or re-erection of any building. As rightly argued by Mr. Nyoni, where a building is erected without a building permit, the authority concerned can take action according to Regulation 139, which stipulates as follows:

"139 (1) If any person –

(a) erects or begins to erect any building without obtaining the permit required by these Regulations; or

(b) [Omitted]

(c) [Omitted]

(d) fails to comply with any notice served upon him in pursuance of sub-regulation (1),

the Authority may in addition to any other proceedings that may be taken for a breach of these Regulations require, by any written notice, such person to demolish and remove such building or any part thereof or make such alteration in such building as it may prescribe within a time to be specified in the notice.

(2) The Authority may in the notice under sub-regulation (1) or another notice notify such person that if the requirement is not complied with within the time specified the Authority will itself enter upon the premises and carry out such demolition, removal or alteration; and if such requirement is not complied with the Authority may act in accordance with the terms of such notice."

In our reading of Regulations 124 (1) and 139 (1) and (2) within the scheme of the Regulations and Cap. 288 (*supra*), nothing suggests to us that the building permit requirement is only limited to erection of buildings on surveyed lands. Thus, we are of the decided view that it applies to erection of a building on any land within the area of jurisdiction of an urban authority in terms of Regulation 2 (a) of the Regulations.

Applying the above standpoint to the instant case, we hold without qualms that the appellant acted within the confines of the law to deal with the respondents' offending developments on the disputed land. We so hold as we find it established on the evidence on record that the erection of the building on the disputed land within a declared planning area clearly contravened the provisions of section 29 (1) of the Act and Regulation 124 (1) of the Regulations, respectively, for want of a planning consent and a building permit. As a result, the appellant was empowered pursuant to either section 74 (2) of the Act or Regulation 139 (1) and (2) of the Regulations to take necessary enforcement measures for the demolition or removal or alteration of the illegal building subject to issuance of adequate notice. On the evidence of the appellant's witnesses fortified by the two demolition notices (Exhibits D.3 and D.4), we entertain no doubt that the appellant followed the applicable procedure before the demolition was carried out. We thus find merit in the first ground of appeal, which we allow.

Even though the outcome on the first ground of appeal is sufficient for the disposal of this appeal, for the sake of completeness we wish to deal with the second ground of complaint, albeit very briefly.

Submitting on the above ground, Mr. Nyoni faults the High Court for affirming the trial tribunal's award of special damages despite its view that the respondents failed to establish the loss. He says that the claimed compensation for the loss complained of was a specie of special damages that ought to have been specifically pleaded and strictly proven as held by the High Court in **Bamprass Star Service Station Ltd. v. Mrs. Fatuma Mwal**e [2000] TLR 390. He made further reference to **NBC Holding Corporation v. Hamson Erasto Mrecha** [2002] TLR 71 where at page 77 this Court held:

> *"The judge made the first award merely for being 'reasonable' in the light of the 10 days the respondent spent at Dar es Salaam.* ***We think reasonableness cannot be the basis for awarding what amounted to special damages but strict proof thereof.*** *"*[Emphasis added]

Conversely, Mr. Rwehumbiza, while admitting that the respondents provided no strict proof of the sum of TZS. 27,000,000.00 pleaded as special damages, contends that trial tribunal had discretion to make its own assessment and award general damages instead. He thus supported the learned appellate Judge's confirmation of the trial tribunal's award of compensation in the sum of TZS. 10,000,000.00.

Both learned advocates are not in dispute on the position of the law illustrated by the authorities cited to us that special damages must be specifically pleaded and strictly proved – see also: **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 173; and **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 (unreported).

In the instant case, we think Mr. Nyoni's criticism of the approach taken in awarding the compensation and assessing the quantum is completely unanswered. To begin with, it is noteworthy that, other than the prayer under Item 7 (c) for special damages for loss due to the demolition, the respondents' amended application contains no specific details of the alleged loss suffered. That omission is further compounded by the respondents' failure to prove that claim strictly, which could have been done by proffering, say, a valuation report on the removed developments. Once such a claim is neither pleaded specifically nor strictly proven, it fails. There would be no point for requiring such a claim to be specifically pleaded and strictly proven if, upon failure to establish it, the claimant would still be awarded a reduced quantum of special damages as was the case in the instant appeal. The trial tribunal had no discretion to do so. With respect, we disagree with Mr. Rwehumbiza that what was awarded was general damages. For that reason,

we would have readily reversed that order for compensation. We thus find merit in the second ground of appeal, which we also allow.

The upshot of the matter is that we allow the appeal with costs. In consequence, we quash and set aside the judgment of the High Court that confirmed the trial tribunal's judgment for the respondents.

DATED at **ARUSHA** this 11th day of April, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E.F. FUSSI
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