

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

LAND CASE NO. 35 OF 2018

**ZEPHRENUS CLEMENT MARUSHWA PLAINTIFF
VERSUS**

**ILEMELA MUNICIPAL COUNCIL 1ST DEFENDANT
THABIT ABEID BIN DHIAB 2ND DEFENDANT
JOSEPH JOHN SHIRIMA as a Guardian
of KELVIN JOSEPH SHIRIMA 3RD DEFENDANT
HERIETH SEIF 4TH DEFENDANT
MSOBI ROGERS SEMVUA 5TH DEFENDANT
DAVID LISSO 6TH DEFENDANT**

JUDGMENT

(exparte with respect to the 2nd and 4th defendants only)

09 & 30/11/2020

RUMANYIKA, J.:

Zephrenus Clement Marushwa (the plaintiff), against the defendants he claims and, among others he prayed for a declaratory order that he is the lawful owner of Plot Numbers 76, 80, 81, 83 and 91 Block "B" Bwiru Ilemela Mwanza (the disputed plots) allocated by Ilemela Municipal Council (the 1st defendant) to Thabit Abeid Bin Dhiab, Joseph John Shirima as

Guardian of Kelvin Joseph Shirima, Herieth Seif and Msobi Rogers Semvua (the 2nd, 3rd, 4th and 5th defendants) respectively. The plaintiff also prayed for damages and costs of the case as usual.

From the record however, it is worthy noted that as they avoided service and now served by way of publication respectively, pursuant to court orders of 11/06/2020 and 24/04/2019 appearance of the 2nd and 4th defendants was dispensed with so was the case for the 5th defendant therefore only with respect to the three exparte judgment. With regard to David Lisso (the 6th defendant) mediation was successful on 03/09/2020.

Dr. G. Mwaisondola and Messrs L. Ringia and Lubango learned counsel appeared for the plaintiff, the 1st and 3rd defendants respectively.

The issues from the outset framed were;

- (a) Whether the plaintiff was the lawful owner of the piece of land constituting the disputed plots before survey and subsequent allocation by the 1st defendant to the 2nd, 3rd, 4th and 5th defendants respectively.
- (b) Whether allocation of plot numbers 76, 80, 81 and 83 to the 2nd, 3rd, 4th and 5th defendants was lawful.
- (c) Whether the 1st – 5th defendants have trespassed onto the disputed plots.
- (d) Reliefs available for the parties.

Pw1 Msabila Bulamile (82) since 1961 a resident of Bwiru Press and the local Ten Cell leader stated that since 1962, together with the plaintiff resided in the material locality wherein the latter and family customarily they owned say an acre of undisputed bare plot and grew some guava,

mango and pawpaw trees and owned two (2) houses. Among others, members of IPDF, Bwiru Middle School and one Matumibli family neighbours thereof. That the disputed area was surveyed in 1996 and allocation effected in 1997 there followed pw1's plot No. 84 which plot at a later stage the plaintiff sold to somebody else.

Pw2 Tabitha Bukelebe (40) for the last 3 years from 1992 a resident of Bwiru Bima area, Mwanza also she stated that the plaintiff had been her stone throw neighbour at Bwiru Press until 1998 when she (pw2) quitted that on the bare land open for public the plaintiff owned three houses and he grew cassava, bananas, ovacado oranges etc.

Pw3 Zephrenus Clement Marushwa (63) stated that according to records of Omumwani Secondary School where he completed Form IV also he was called Zephrine Kamuntu Bushuge (copy of affidavit-Exhibit "P1") one having worked with Mwanza Municipal Council since 1988 – 1996 when he was retrenched. That he was since 1992 – 2018 a resident of Bwiru Press area. A lady, one Mhaya Mabipi Matumbili free of charge and orally having had given him say 3 acres of land just for a token shs. 7,000/= (seven) therefore customarily owned it he erected 3 houses and grew bananas, quava, oranges, eucalyptus etc. one Msalaba, Galomwa and Pw2's mother were his neighbours among others.

That some times and repeatedly (the 5th time on 01/07/1996) having has asked for survey, and in writing the 1st defendant acknowledged receipt of his requests, the latter promised to, and on their behalf one Tegambwa and Msafiri came and surveyed the land in August 1996 (upon tendering by him in that regard a bunch of photo stat copies of the plaintiff's requests and correspondences between him and the 1st

defendants and, on that basis Mr. L. Ringia, learned counsel objected, I overruled the p.o. Having marked the letters as Exhibit "P2" collectively, I reserved reasons therefor and promised to give one at a later stage. Here are the reasons; not only it was an undeniable fact that for whatever term one having had occupied and perhaps utilized the disputed bare land the plaintiff asked the 1st defendant to survey it, but also at a given point in time one may have been served or not served with a notice to produce fine, nevertheless neither the 1st defendant's acknowledgement of receipt of the request for survey or promise to, it even constituted no letter of offer nor was is equivalence of it. It is for these reasons therefore that I overruled the p.o. (copy of the plaintiff's letter on thanking them for having accomplished the survey – Exhibit "P3").

That upon survey 14 (fourteen) plots of them were obtained but without compensation paid to the plaintiff, some plots were just allocated to the 2nd – 6th defendants and, with respect to a plot he retained they served him invoice for survey costs (Exhibit "P4") leave alone shs. 1,176,900/= being allocation fee for plot No. 80 which it was nevertheless otherwise allocated by the 1st defendant that as he was prepared to pay, the 3rd defendant just stormed in claiming ownership so was the case with respect to the other defendants and the remaining plots. One having had asked to pay in instalments but all the time the 1st defendants turned a blind eye irrespective of the case having been reported thereto, the local District Commissioner and related authorities (copy of the letter(s) -Exhibits "P5" and "P7") that out of it having been allocated plot No. 84 he sold it in 2010 and he shifted to another disputed plot Nos. 81 and 83. The 6th defendant's land turned out to be Plot No. 81. That him having had asked

for a plot, with their letter dated 05/02/2007 to the 6th defendant, the 1st defendants recognized the plaintiff lawful owner of the disputed land (copy of the letter-Exhibit "P8").

Dw1 Seif Abdalah (61) with effect from 1969 a resident of Bwiru Press, Ilemela district he stated that he was brought up there therefore ex-pupil of the local Bwiru Middle School but also for the periods of 2004 – 2009 and 2014 - 2019 the school committee chair who knew the plaintiff before because as at the time the later resided in one of the Medical Research Institute servant quarters around also he built a house in the government land, as there was road construction therefore on that ground upon acquisition of the land by the government the plaintiff was paid compensation which land some times in 1992 the TPDF gave vacant possession to Mwanza Municipal Council. Then the 1st defendants took over. Although the plaintiff had erected a mud-walled two room house, a sitting room, a kitchen and pit latrine, shortly the land was surveyed therefore declared developed for which development but only for the sake of convenience the plaintiff was paid compensation leave alone an alternative plot which nevertheless he sold in year 2000.

Dw2 Ndibaiyukao Francis Mchunguzi (69) also since 1980 a resident of Bwiru Press, Pasiansi ward and ex-member of TPDF he stated that until as late as they had, in the locality a militia training institute and he served it as the Chief Instructor, amongst them they shared the boundary with Bwiru Middle School and individuals. That he owned no plots around until 1989 when he purchased one from one Boneventura @ Mhaya who had a big parcel of land then he (Dw2) had it formally allocated to him by the 1st

defendants. That survey of the government land resulted into the disputed plot Nos. 76-84. That he retired in 1998 and his plot was surveyed in 1992.

Dw3 Elia Anatory Kamihanda (35) at the time Authorized Land Officer for Mwanza Region, he stated that he served foreign local council inclusive of the 1st defendants. That following a long pending and unresolved land dispute, but upon completing investigations on 17/10/2016 eventually they found the plaintiff was not lawful owner of the disputed land but the government (copy of the findings letter – Exhibit "D1") the same having had changed hands from Bwiru Middle School – TPDF and now the 1st defendants but for the encroachment by people inclusive of the plaintiff. That out of 14, plot Nos. 80 and 82 were allocated to him but he did not pay the requisite allocation fee within 30 days given (copy of the Invoice – Exhibit "P4") leave alone plot No. 84 Block "N" which again he sold that given the obtaining circumstance there was, in favour of the plaintiff neither customary right nor right of adverse possession available. That as only against the 6th defendant with respect to it the plaintiff had Land Case No. 01 of 2003 which was later on dismissed for want of prosecution (copy of court proceedings – ID "D1" only for identification purposes), by virtue of provisions of the Land Ordinance of the time ie. 2007, unlike today the plaintiff was compensated only for exhaustive improvements namely the mere pit latrine and some trees (copy of Evaluation Report – Exhibit "D2"). That with copy of the Invoice dated the 04/05/2017 (Exhibit "D3") we charged him not for regularization but as costs of acquiring land. That since the current Land Act it came into force, individual incoming were obliged to compensate outgoing occupiers (for areas other than those reserved for public use).

Dw4 Hermes Tegambwa (63) a Diploma Holder of Ardhi Institute and retired Land Surveyor (1983 – 2008) who, at the time worked with Mwanza Regional Administrative Secretary, with regard to the case at hand he stated that at the time partly the disputed land customarily belonged to individuals and partly to TPDF until 1994/95. That having had been duly assigned, with all the details and existing physical features he surveyed the entire disputed land whereby the plaintiff having had occupied it and, with a mud-walled hut developed the TPDF's plot, the survey plan was approved in 1997 (copy admitted as Exhibit "D4"). The same having been objected, but objection overruled and reasons therefor reserved. I would hold that at times for production of an exhibit it is not the timing that counts but only the dictates of substantive justice provided that like it is the case here, at no given point in time there was no adverse party's concern that with intention to defeat the end of justice the document was doctored. It is for this reason that I overruled the objection.

Dw5 Joseph John Joseph (40) stated that with respect to the case, and on behalf of his son from one Salum Amani Magongo having purchased a bit developed plot and he had the title duly transferred to him (copy(s) of the sale agreement and certificate of Title – Exhibit "D5") collectively, a 3rd party just stormed in, and on that one the local land allocating authorities having had admitted the mistake, alternatively they allocated him plot No. 80 (copy(s) of the allocation letter and certificate of Title – Exhibits "D6" and "D7") collectively. Then in that regard we processed and obtained a building permit. The plaintiff's case is, as far as my self is concerned baseless. Dw5 further contended.

There followed very brief final written submissions of Messrs L. Ringia and Dr. Mwaisondola learned counsel.

As earlier on framed, the pivotal issue was whether the plaintiff lawfully owned the disputed plots. The plaintiff may have had for quite some time been founder, he occupied and utilized the land undisturbed yes, but on this one not only Dw2 and Pw2 might have cut the long story short, but also Dw3 who said that actually the disputed land belonged to the 1st defendants. Nor was the doctrine of adverse possession applicable against the 1st defendants given the time taken and the obtaining circumstances. After all it is both common knowledge and trite law that time does not run against the government once a trespasser always a trespasser.

The plaintiff may have had occupied the disputed land and now he asked the 1st defendants to survey it and, possibly to formally allocate it to him fine leave alone be it compensation or something, one or two plots out of it earlier on allocated to the plaintiff and, on that one the first defendant acknowledged receipt of the plaintiff's letters or even they promised him some more yes, but frankly speaking whatever the 1st defendants might have done with all intents and purposes it constituted no letter of offer or something (see Exhibit "D1").

Moreover, upon payment of shs. 7,000/= as gift (not a sale price) chances of the plaintiff having been fixed couldn't have been ruled out. I would increasingly hold that in all cases where deemed right of occupancy was identified and established, neighbours had powers but on that one the respective local authorities were more authoritative. Pw1 was worth the name not one of them. I think if land titles were established and proved by

plain words then there would have been no trespassers, suffices the two points above to dispose of the remaining issues and the entire suit.

In the upshot, the suit lacks merits and it is dismissed with costs. It is so ordered.

Right of appeal explained.




S. M. RUMANYIKA

JUDGE

18/11/2020

Judgment is delivered under my hand and seal of the court in chambers this 30/11/2020 in the presence of the plaintiff in person and Mr Ringia and Rubango for the 1st and 3rd respondents.




F.H. MAHIMBALI
DEPUTY REGISTRAR
30/11/2020