

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT TABORA.

LAND APPEAL NO. 2 CF 3 OF 2019

(Arising from Land Application No.48/2014 in the District
Land and Housing Tribunal for Tabora)

WAZIRI AMRI NENETWA.....APPELLANT

VERSUS

1. TABORA MUNICIPAL COUNCIL }
2. EPHRAIM KWILABYA }RESPONDENTS

JUDGMENT

Date of Last Order: 29/01/2020

Date of Delivery: 13/03/2020

AMOUR S. KHAMIS, J.:

Waziri Amri Nenetwa was aggrieved by judgment and Decree of the District Land and Housing Tribunal for Tabora which declared Ephraim Kwilabya as lawful owner of the disputed land, plot No. 334, Block “M”, Chemchem area, Tabora Municipality.

He challenged the impugned Judgment on seven (7) grounds, namely:

1. That the trial tribunal erred in law and in fact in failing to evaluate the evidence before it thus misdirecting itself in arriving at a wrong judgment.
2. That the trial tribunal erred in law to conclude that the 2nd respondent has developed the disputed plot which was not the fact.
3. That the trial tribunal erred in law and in fact to conclude that there was oppression (uonevu) while the 2nd respondent was given the land in dispute for temporary use.
4. That the trial tribunal erred in law and in fact to hold that the first respondent was supposed to compensate the appellant the other plot without due regard that the 2nd respondent has been given alternative land at Usule area as compensation to the disputed land.
5. That while appellant had a title deed and the same having not been revoked by any authority, then the trial tribunal erred in law to declare the 2nd respondent as the owner of the disputed land instead of the appellant herein.
6. That in absence of ownership document from the 2nd respondent the trial tribunal erred in law to order the first respondent to delete the name of the appellant in its registration register.
7. That the tribunal erred in law to order the first respondent to give an alternative land to the appellant without ordering evaluation and consider the market value of the disputed land.

In an Application Form initiating proceedings at the tribunal, Waziri Amri Nenetwa pleaded that plot no. 334, Block “M”, Chemchem area, Tabora Municipality, was allocated to him by Tabora Municipality Council and up on fulfilment of necessary conditions, a certificate of title No.44964 LR Mwanza was issued to him.

He alleged that on unknown date, Tabora Municipal Council re-allocated the land to Ephraim Kwilabya, an act he referred to as illegal.

He averred that in consequence of the illegal allocation, Ephraim Kwilabya occupied the disputed land and prevented him from exercising proprietary rights.

He prayed for declaration that the disputed land belonged to him and payment of Tshs.2,000,000/= as general damages on account of trespass.

Waziri Amri Nenetwa further sought an order of eviction against Ephraim Kwilabya and a perpetual injunction restraining him, his workmen, servants, agents, assigns and any other person acting under him from interfering with his (Waziri A. Nenetwa’s) peaceful enjoyment of the disputed land.

Ephraim Kwilabya filed a written statement of Defence contending that the disputed land was allocated to him in the year 1991 prior to its survey.

He pleaded that the land was surveyed in 2011 to become plot No. 334, Block “M”, Chemchem area, Tabora Municipality.

He averred that on 17/12/2012 he wrote a letter to Tabora Municipal Council for a certificate of title but the same was not responded to.

Ephraim Kwilabya asserted that he had developed the suit land by erecting a milling plant valued at Tshs.113,761,000/+ and that he never received any letter demanding him to vacate from the plot.

In its written statement of Defence, Tabora Municipal Council stated that it permitted Ephraim Kwilabya to use the disputed land temporarily on understanding that it could revert back to it when a need arises.

The Municipal authority insisted that there was no double allocation on a land in dispute and recognized Waziri Amri Nenetwa as a lawful owner thereof.

In a further reply, Tabora Municipal Council pleaded that Ephraim Kwilabya had refused to vacate from the disputed land belonging to Waziri Amri Nenetwa.

The local authority traced ownership of Waziri Amri Nenetwa.

To a conveyance by Ramadhani Mtwale of which was procedurally complete whereupon a certificate of title was issued to Waziri Amri Nenetwa in the year 2013.

In a further reply, Tabora Municipal Council averred that on 31/05/2013 it replied Ephraim Kwilabya's letter vide its letter referenced TMC/M/38 Vol.III/61 which reads:

"Rejea barua yako ya tarehe 17/12/2012 iliyohusu ombi la kumilikishwa kiwanja tajwa hapo juu.

Napenda kukutaarifu kuwa nyaraka ulizoambatanisha ili kutia uzito ombi lako hazina uhusiano na kiwanja namba 334. Aidha namba 334 ya kiwanja na jina lako tofauti na nyaraka halisi (original) ili kuzihusisha na ombi lako jambo ambalo ni ukiukwaji wa sharia.

Nyaraka ulizonazo zilikupa idhini ya kujenga banda la muda la mashine ndani ya Kiwanja cha Halmashauri (pombe shop) na ulielekezwa uwe tayari kuliondoa wakati wowote utakapotakiwa kufanya hivyo bila masharti. Kumbuka kuwa kila mwenye mashine eneo hilo tayari amepatiwa kiwanja eneo la viwanda la Usule na kutakiwa kuanza maandalizi ya kuhama.

Kwa maelezo ya hapo juu ombi lako limekataliwa.....”

Tabora Municipal Council moved the tribunal to declare Waziri Amri Nenetwa as a lawful owner and for an order of eviction against Ephraim Kwilabya.

Upon a full trial, the trial Chairman declared Ephraim Kwilabya as lawful owner of the disputed land.

The trial tribunal further ordered Tabora Municipal Council to issue ownership documents to Ephraim Kwilabya and delete Waziri Amri Nenetwa's name from the land register.

Against this background, the appellant, Waziri Amri Nenetwa moved this Court to quash the trial tribunal's judgment and declare him as lawful owner of the disputed land.

When the appeal was placed before me for hearing, the appellant was represented by Mr. Emmanuel Musyani, learned advocate.

Mr. Kullaba Dotto, learned Solicitor acted for Tabora Municipal Council while Mr. Kamaliza Kayaga, learned advocate had a conduct of Ephraim Kwilabya's brief.

The appeal was canvassed through written submissions and each party observed a timeline set by the Court.

I have read and considered the rival submissions filed by Mr. Emmanuel Musyani, Mr. G. Dotto, learned advocates.

The same will be reflected in the course of addressing contentions issues, where necessary.

It should be noted that prior to re-assignment of the appeal to me, land Appeal No. 2 of 2019 filed by Waziri Amri Nenetwa and Land Appeal No. 3 of 2019 lodged by Tabora Municipal Council were consolidated on 21/03/2019.

In essence, the seven grounds of appeal preferred by Tabora Municipal Council are replica of those fronted by Waziri Amri Nenetwa in Land Appeal No. 2 of 2019. I therefore find no need of reproducing them.

I will address the grounds of appeal in seriatim.

In the first ground of appeal the appellants alleged that the trial tribunal failed to evaluate the evidence before it.

Upon reading the record, I noted that grounds Nos. 1, 2, 3 and 4 are interrelated as they touch on failure to evaluate the evidence on record.

On examination of the impugned judgment, I noted that the evidence on record was neither examined nor referred to.

The trial Chairman at page 4 of the typed judgment, made a blanket statement on the evidence and concluded that, he chose to concur with opinion of the lay assessors.

He wrote that:

“On my side upon hearing of the parties and their witnesses together with the exhibits tendered before this tribunal and upon visiting to the locus in quo, I choose to concur with the opinion of the two lay assessors that since the 2nd Respondent one Ephraim Kwilabya has utilizing (sic) the land in dispute for almost 27 years as from 1991 to date (2018) and taking into consideration that the 2nd respondent has develop (sic |) the area as there is milling machine into (sic) the area and the services are done to the same”

Apart from the above reproduced paragraph, there is nowhere else where the trial Chairman evaluated testimonies of witnesses and contents of the exhibits received.

In such circumstances, I draw inspiration from the Court of Appeal for East Africa in **PETER V SUNDAY POST (1958) E.A 424**

that on appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Court should stand.

A similar position was stated on **D.R. PANDYA V. REPUBLIC (1957) E.A 336 and MAKURU JUMANNE & ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO. 117 OF 2005** (CAT – unreported).

Before the trial tribunal, each party had fielded one witnesses marked PW.1, DW.1 and DW.2.

Waziri Amri Nenetwa testified as PW.1 in support of his case while Ephraim Kwilabya was DW1.

Stanley Yungu, a land officer, was the sole witness for Tabora Municipal Council (DW.2).

The main issue in the tribunal was: who is the lawful owner of the disputed premises. In my view, that issue is still relevant in this appeal.

In response to that issue, PW.1 Waziri Amri Nenetwa stated that on 21/04/2008, he bought house No.30, Madaraka Street, Chemchem area, Tabora from one Ramadhani Mtwale and transfer of a right of occupancy was accordingly done.

On examination by Mr. Emmanuel Musyani, PW.1 testified that upon payment of necessary fees, he was issued with a building permit before was advised to wait for further instructions.

He was subsequently given an alternative plot, namely plot No.334. Block “M”, Chemchem area, Tabora Municipality.

On further examination, he said that the letter of offer was issued to him on 11/02/2013.

On cross examination by Mr. Kayaga, PW.1 stated that:

“.... Plot No.30 was taken by the 1st respondent and they give me plot No. 334. There was no shortcut to the owning of plot No. 334.....”

On re – examination by Mr. Musyani, PW.1 testified that:

“The plot in dispute No.334 was given to me as compensation from plot No.30. I was given building permit to the plot No.30 (sic). After the building permit I built not to the area as the 1st respondent informed me that the area will be given an alternative land.”

DW.1 Ephraim Kwilabya testified that he was in occupation of the disputed land since 1991.

He said that upon an application to Tabora Municipal Council, was allowed to install milling machines at a junction of Salmin and Madaraka roads (the disputed land).

On examination by Mr. Kayaga the witness stated that:

“After I cleaned the area the Municipality informed me that they have not issued the plot numbers so we were supposed to use the area temporarily. We had to build the temporary building. I built the building by using MABATI so I constructed “BANDA LA MABATI”. After the construction of the building, I was given the license doing business.....”

On further examination, DW.1 said that:

“Since 1991 until 2011 on the survey the suit plot is being utilized (sic) by me and I used to pay all rent to

TRA and Municipality of Tabora. I have the documents such as the receipt of 1991

DW.1 further testified in chief, that:

“After the survey in 2011, on 17/12/2012 I wrote the letter to the Municipal Director on the issue of being given the title deed over plot No. 334 which I am there since 1991.....

Since on 17/12/2012 up to this moment the Municipality of Tabora has never replied to my letter. Up to this moment I am the owner of the area. I paid the land rent to the Municipality of Tabora.....”

On cross examination by Mr. Musyani, DW.1 testified that:

“I was allocated the plot by the Municipality of Tabora. I have no document to prove for the same. The plot is the property of the Municipality of Tabora.....

I have no copy of the document to show that on 1991 I requested to be allocated the plot by the Municipality of Tabora.

I have no building permit to build the factory over the area.”

On cross examination by Mr. Kullaba Dotto, the witnesses stated that:

“I was allowed to use the area by writing but I have lost the document since it is longtime..... I was

allowed to build "BANDA LA BATI LA MUDA". It was June, 1991 when the license was issued....."

On further cross examination by Mr. Kullaba Dotto, Ephraim Kwilabya stated that:

"The permit was issued on 15/06/1991. The permit is for building temporary building into (sic) the area"

On examination by a tribunal assessor, Mama Nsimba, as reflected in page 31 of the typed proceedings, DW.1 said that:

"The evidence to prove that the area is mine is the business license and I have no problem with the Municipality of Tabora. The factory is there legally."

DW.2 Stanley Yungu informed the tribunal that he was a land officer with Tabora Municipal Council.

He testified that the disputed plot belonged to Waziri Amri Nenetwa and measured 524 square meters.

On cross examination by Mr. Kayaga, DW.2 state that:

"House No.30 now is the road. We are okay as per the records of the first respondent. The applicant got plot No.334 as compensation after the House No. 30 was taken by the road....."

On cross examination by Mr. Musyani, Stanley Yungu, stated that:

"The second respondent was given conditions on plot No. 334 that not to put permanent structures to the plot as the Government will take the area at any time."

*Exhibit D.2 the area was issued for temporary use
.....”*

On further cross examination by Mr. Musyani (page 38 of the typed proceedings), DW.2 shared this information:

“The second respondent was given another area at Usule which is industrial area.....”

As per the records of Municipality of Tabora, there is no other person who owned plot No. 334. We recognize the Applicant.”

I have also examined the exhibits admitted by the trial tribunal. Exhibit P.1 is Land form No. 35 showing transfer of a right of occupancy over House No. 30, Madaraka Street, Chemchem area, Tabora Municipality.

The conveyance dated 21/04/2018 supported by Land forms Nos. 30, was between Ramadhan Mtwale (transferor) and Waziri Amri Nenetwa (transferee).

A consideration for the transfer was Tshs. Four Million (shs.4,000,000/=) only.

Exhibit P.2 shows exchequer Receipts Nos.31472289 for Tshs.61,280/= in respect of Land rent for plot No. (house No. 30), Madaraka street paid by Ramadhani Mtwale on 22/04/2008 and Exchequer Receipt No.31473390 for Tshs.47,100/= paid by Waziri Amri Nenetwa as stamp duty, notification and approval fees for plot No (House No. 30), Chemchem area, Tabora Municipality.

Exhibit P.3 is a building permit over House No. 30, Chemchem area issued on 13/05/2008 by Tabora Municipal Council to Waziri Amri Nenetwa.

Exhibit P.4 is a letter by Tabora Municipal Council to Waziri Amri Nenetwa dated 29/04/2008.

The said letter with reference No. TMC/LD/TTC/905 reads:

*“YAH; HAKI YAKO JUU YA ARDHI ULIYONUNUA
INAYOSOMEKA HOUSE NO.30 MTAA WA
MADARAKA.*

*Tafadhali rejea kichwa cha habari hapo juu na
uhamisho wa miliki iliyofanywa kwenye ardhi tajwa
hapo juu.*

*Kwa barua hii ifahamike kuwa umenunua ardhi
ambayo halmashauri ilipanga kwa matumizi ya
barabara kwa kuwa aliyekuuzia ardhi hiyo alikuwa
na haki ya kulipwa fidia baada ya hiyo
kubadilishwa matumizi, haki hiyo inahamia kwako.
Utalazimika kusubiri ofisi hii ikutafutie kiwanja
mbadala kitakachopatikana Baada ya kufuta
miliki za viwanja ambavyo havijaendelezwa.*

Nategemea kupata ushirikiano wa karibu.

Imesainiwa

MKALIPA F.C.

AFISA MTEULE WA ARDHI

HALMASHAURI YA MANISPAA

TABORA”

Exhibit P.5 is an adduce of payment in respect of plot No. 334, Block “M” survey Reg. plan No. 96571, measuring 524 M2, Chemchem area, Tabora issued by Tabora Municipal Council to Waziri Amri Nenetwa on 11/02/2013.

Exhibit P.6 is a certificate of title No.44964 LR Mwanza over plot no. 334, Block “M”, Chemchem area, Tabora issued to Waziri Amri Nenetwa on 31/05/2013.

Exhibit P.7 is exchequer receipt No.50061413 as land rent on a plot in dispute for the years 2013/2014 paid by Waziri Amri Nenetwa.

There is also exchequer receipt No.1865431 for 2014/2015 over the disputed land paid by Waziri Amri Nenetwa on 01/07/2014.

In my view, all these pieces of evidence jointly and together support that Waziri Amri Nenetwa was allocated plot No. 334, Block “M”, Chemchem area, Tabora Municipal Council as compensation for House No. 30, Madaraka Street, Tabora that was marked for road construction.

The documentary exhibits corroborated oral testimonies of PW.1 Waziri Amri Nenetwa and DW.2, Stanley Yungu.

On the other hand, DW.1 Ephraim Kwilabya, strengthened the assertion by Tabora Municipal Council that the disputed plot was temporary licensed to him on understanding that it could be revert back to the local authority at any point in time.

I am satisfied that there is no any evidence suggesting that the disputed land prior to its survey, was allocated to Ephraim Kwilabya, an permanent terms.

I have carefully examined exhibits D.1, D.2, D.3, D.4, D.5 and D.6, and found out that none of them proves Ephraim Kwilabya's claims on ownership of the disputed plot.

If anything, the said exhibits proves that Ephraim Kabanza Kwilabya is a proprietor of M/S Kalu Grain Mills located at Salmin/Madaraka Streets, Kachoma, Chemchem, Tabora.

In my understanding, ownership of a business has nothing to do with ownership of a plot on which the said business is situated.

For the stated reasons, I am satisfied that the trial Chairman misdirected himself on failure to evaluate the evidence on record and wrongly declared Ephraim Kwilabya as owner of the disputed land.

To the contrary, there is overwhelming evidence showing that Waziri Amri Nenetwa was lawfully allocated the land in dispute by Tabora Municipal Council and this lawfully owns the disputed land vide certificate of title No. 44964 LR Mwanza.

On account of the aforestated reasons, grounds Nos. 5, 6 and 7 of appeal have been equally tackled and I see no need of revising them.

Consequently, the appeal is allowed and I proceed to make the following necessary orders:

1. The appellant Waziri Amri Nenetwa is hereby declared a lawful owner of plot No. 334, Block "M", Chemchem area, Tabora Municipality.
2. That on account of a fact that Ephraim Kwilabya was temporarily licensed to occupy the disputed land, the license

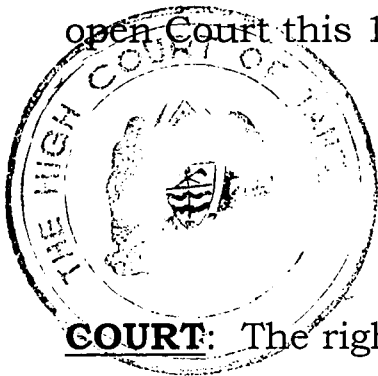
came to an end when the disputed land was allocated to Waziri Amri Nenetwa.

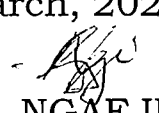
3. That on the undertaking expressed by Tabora municipal Council, Ephraim Kwilabya is entitled to an alternative industrial plot at Usule area, Tabora Municipality.
 4. That Ephraim Kwilabya should vacate and handover vacant possession of the disputed land to Waziri Amri Nenetwa.
 5. That owing to history of the dispute, I make no order for costs.
- It is so ordered.

Signed
AMOUR S. KHAMIS
JUDGE
13/03/2020


COURT:

Judgment delivered in presence of the appellant, respondents and Mr. Kelvin Kayaga, the 1st respondent's learned Counsel in the open Court this 13th day of March, 2020.




G. NGAEJE
Ag. DEPUTY REGISTRAR
13/03/2020

COURT: The right as to appeal fully explained.


G. NGAEJE
Ag. DEPUTY REGISTRAR
13/03/2020