

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND CASE NO. 7 OF 2019

ELIAS MWITA SAMO 1ST PLAINTIFF
FRANCIS NYERERE SAID 2ND PLAINTIFF
MUSA EMMANUEL (ADMINISTRATOR OF
ESTATES OF THE LATE PAULINA STEPHANO) 3RD PLAINTIFF
MICHAEL THOMAS KWEKA 4TH PLAINTIFF
JOHN MWITA CHACHA 5TH PLAINTIFF
MGERI MATUTU 6TH PLAINTIFF
JULIUS ODERA 7TH PLAINTIFF
MSAFIRI MAGIRARI MAJIGE 8TH PLAINTIFF
PHARES MEGERA 9TH PLAINTIFF
MUSA BUDEBA NZUGIRA 10TH PLAINTIFF

VERSUS

BUNDA TOWN COUNCIL 1ST DEFENDANT
TANZANIA NATIONAL ROADS AGENCY 2ND DEFENDANT
THE ATTORNEY GENERAL 3RD DEFENDANT
MINISTER FOR LANDS, HOUSING AND
HUMAN SETTLEMENTS 4TH DEFENDANT
COMMISSIONER FOR LANDS 5TH DEFENDANT

JUDGMENT

19th March, 2021

KISANYA, J.:

On 18th April, 2019, the 2nd defendant, Tanzania National Roads Agency (TANROADS) issued a notice requiring the plaintiffs to demolish or remove the structures developed within 22.5 meters from the centreline of

Nyamuswa-Bulamba-Kisorya (121.9 km): Part of Nyamuswa- Bunda-Bulamba (56 km) within 90 days from the date of receipt of notice. Believing that they are the lawful owners of the disputed land, the plaintiffs instituted a suit against the first, second and third defendants. They prayed for judgment and decree as follows:

- (a) That, the 1st, 2nd, 3^d, 4th, 5th, 6th, 7th, 8th, 9th and 10th plaintiffs be declared as a lawful owner of the land in dispute.*
- (b) That, the 1st and 2nd Defendants be ordered to compensate the 1st, 2nd, 3^d, 4th, 5th, 6th, 7th, 8th, 9th and 10th plaintiffs to the tune of 1,100,000,900/= one billion, one hundred million and nine hundred only according to the market value.*
- (c) That, the 1st and 2nd defendants be ordered to stop demolishing property of the 1st, 2nd, 3^d, 4th, 5th, 6th, 7th, 8th, 9th and 10th plaintiffs until the plaintiffs has been compensated.*
- (d) That, the 1st and 2nd Defendants to pay the costs of this suit.*
- (e) Any other relief that this Honourable Tribunal (sic) deems fit and just to grant.*

Upon failure of the mediation, the fourth and fifth defendants prayed to be joined. In their joint written statement of defence, the defendants denied the plaintiffs' claims and moved this Court to dismiss the same with costs.

During the final pre-trial conference, the following issues were framed for determination of the matter by the Court:

1. Whether the plaintiffs are lawfully owner of the suit land or whether the suit land falls within the road reserve.
2. If the first issue is answered in affirmative, whether the plaintiffs are entitled to compensation.
3. To what reliefs are the parties entitled to.

At the hearing of this case, Mr. Ostack Mligo and Mr. Godwill Mweya, learned advocates appeared for the plaintiffs. On the other side, the defendants were represented by Ms. Subira Mwandambo, Mr. Saddy Rashid and Mr. Yona Shija, learned state attorneys.

Before the hearing could take off, the 4th plaintiff prayed to withdraw his claims against the all defendants. In consequent, the 5th, 6th, 7th, 8th, 9th and 10th plaintiff are hereby referred to as the 4th, 5th, 6th, 7th, 8th and 9th respectively. A total of 8 witnesses testified for the remaining 9 plaintiffs and tendered 13 exhibits to supplement their oral testimony. Thus, each plaintiff gave evidence on oath and called no other witness. As to the defendants, four witnesses were called to disapprove the plaintiffs' claims.

I will now proceed to determine the framed issues in accordance with evidence adduced before this Court. It is trite law that the burden of proof lies on the person stating existence of a certain fact. The principle is expressed in sections 110 and 111 of the Evidence Act [Cap 6, RE 2019].

This being a civil suit, the standard of proof is on balance of probabilities. The Court's decision is based on evidence which is more credible and probable than that of the adverse party.

The first issue is whether the plaintiffs are lawfully owner of the suit land or whether the suit land falls within the road reserve. Each of the plaintiffs deposed to be lawful owner of houses developed on the plots land located at Bunda Urban Area. They testified further that their respective plots were allocated to them by the 1st defendant.

Five plaintiffs tendered the certificates of title/occupancy granted by the 4th and 5th defendants to supplement their oral testimony. These were the PW1 Elias Mwitwa Samo (1st plaintiff), PW3 John Mwitwa Chacha (4th plaintiff), PW5 Phares Megera (8th plaintiff), PW6 Msafiri Magirari Majige (7th plaintiff), and PW8 Musa Budeba Nzugira (9th plaintiff). They tendered certificates of occupancy in respect of Plot No. 44, Block F, Bunda Urban Area (Exhibit PA1) for the 1st plaintiff; Plot No. 194, Block N, Bunda Urban Area (Exhibit PA3) for the 4th plaintiff; Plot No. 18, Block L, Bunda Urban Area (Exhibit PA6) for the 8th plaintiff; Plot No. 204, Block N, Bunda Urban Area (Exhibit PA7) for the 7th accused; and Plot No. 5, Block H, Bunda Urban Area (Exhibit PA12) for the 9th plaintiff.

Other two plaintiffs tendered land receipts and other receipts paid to the 1st defendants to prove ownership of the land in dispute. These were the PW7 Mgeri Matutu (5th plaintiff) and the 6th plaintiff PW4 Julius Odera (6th plaintiff) whose receipts in respect of Plot No. 202, Block N Bunda and Plot No. 200, Block N, Bunda were tendered as Exhibits PA9 and PA7 respectively.

PW2 Francis Nyerere Said (the second plaintiff) did not tender any document to prove ownership of land. He contended that his certificate of title had been mortgaged at NMB Bank, Bunda Branch. Lastly, the 3rd plaintiff whose evidence was also given by PW8 tendered a certified copy of transfer right of occupancy (Exhibit PA11) which is in the name of Emanuel Budeba Nzugila and not the late Paulina Stephano whom he administers her estates.

In their defence, the defendants do not dispute that the plaintiffs and other residents of the same locality had been living in the disputed land. This is reflected in evidence of Dickson Yohana Mwinuka (DW2), Janeth Peter Mayanja (DW3) who happened to be the District Executive Officer of the 1st defendant and Frank John Minzikuntu (DW4), Assistance Commissioner for Land from the fourth and fifth defendants. According to them, the plaintiffs and other villagers' land was planned by the first

defendant vide Town Planning Drawing No.15/1/1982 of 1982-(hereinafter referred to as TP Drawing) Thereafter, the disputed land was formalized whereby some of the plaintiffs were granted with certificates of title by the fourth and fifth defendants.

However, DW2, DW3 and DW4 stated on oath that, there was an error in the TP Drawing which led to formalization and issuance of the certificates of occupancy in respect of the land in dispute. They stated so basing on the fact that, the TP Drawing did not take into account the width of the road (road reserve) which was in existence at that time. DW4 told the court that, the disputed land is exclusively managed by the 2nd defendant and that it was not required to be allocated or granted to the plaintiffs or any other person.

From there, it is deduced from Deogratias Chacha Makori (DW1) who gave evidence for the 2nd defendant that, that the plaintiffs' plots and developments thereto are within 22.5 meters from the centreline of Nyamuswa-Bunda-Kisorya Road measuring 106.4 km. This witness told the Court that Nyamuswa-Bunda-Kisorya Road was established by Government Notice (GN) No. 156 of 1951, republished by GN. No. 471 of 1962 and its width stated to be 22.5 meters from the centreline of the road each side. DW1, went on to depose the second defendant issued notice to persons

who invaded within 22.5 metres from the centreline and not beyond. He admitted that, the plaintiffs would be entitled to compensation if there is evidence to prove that they were in occupation of their respective plots before the coming into force of GN No. 471 of 1962.

In view of evidence adduced by both parties, Mr. Mligo submitted that the plaintiffs had proved on balance of probabilities that the disputed land was allocated, formalized and certificates of title granted by the 4th and 5th defendants. He argued further that, the plaintiffs were not responsible for the errors committed by the 1st, 4th, and 5th defendants' officers.

On her part, Ms. Mwandambo submitted that the 1st issue is answered in affirmative that, the suit land falls within the road reserve. Her submission was based on the following reasons: **One**, the road reserve could not have been legally allocated by another authority. **Two**, the 1st defendant had no power to allocate land which is in exclusive management of the 2nd defendant. **Three**, the plaintiffs had developed their respective plots prior to issuance of certificate of title thereby trespassing to road reserve. **Four**, the TP drawing which led to issuance of certificates of title did not take into account the road reserve which was in existence before 1982.

Upon thorough examination of evidence adduced by both parties, it is common ground that, save for 2nd and 3rd plaintiffs (PW2 and PW8), the plaintiffs have tendered documents to proof how their respective plots located at Bunda Urban Area were formalized by the 1st, 4th and 5th defendants. While the 2nd plaintiff failed to give an oral evidence pertaining to his plot land, the 3rd plaintiff did not give evidence to show how the disputed land is part of estates of the late Paulina Stephano. Furthermore, PW5 Phares Megera (8th plaintiff) did not prove ownership of Plot No. 17, Block L, Bunda Urban pleaded in the plaint. As stated herein, he proved ownership in respect of Plot No. 18, Block L, Bunda.

Therefore, the burden shifts to the defendants and the 2nd defendant in particular, to prove that the land allocated and formalized to the plaintiffs save for the 2nd and 3rd plaintiffs falls within the road reserve. In terms of the notice (Exhibits PA2, PA5, PA8 and PA13) served to the plaintiffs, the land in dispute was alleged to be within 22.5 meters from the centreline of Nyamuswa- Bulamba- Kisorya (121 KM): Part of Nyamuswa-Bunda-Bulamba (56.4KM). In my view, the first issue can be disposed of by addressing the question as to when was the road stated in the 2nd defendant's notice established?

Pursuant to DW2, the Nyamuswa-Bunda-Kisorya Road was established by GN. 156 of 1951, republished in GN. No. 471 of 1962 and its width stated as 22.5 meters from the centreline of the road each side. Reading from the GN. 156 of 1951 and GN. No. 471 of 1962 referred to by DW1 and appended to the defendants' written submissions, I find no mention of Nyamuswa- Bulamba- Kisorya (121 KM) or Nyamuswa-Bunda-Bulamba (56.4KM). According to rule 2 of the Highways (Width of Highways), Rules, 1951, GN. No. 156 of 1951, the highway specified in the Schedule thereto was stated to be 75 feet (equivalent to 22.5 meters) from the centre of such high way. However, Nyamuswa- Bulamba- Kisorya (121 KM) or Nyamuswa-Bunda-Bulamba (56.4KM) subject to the case at hand is not specified in the Schedule to GN. No. 156 of 1951.

Likewise, the Nyamuswa - Bulamba- Kisorya road does not feature in a list of local main roads specified under the Highways (Republication), Order, 1962, GN. No. 471 of 1962 which republished the first schedule to the Highways Ordinance. What is referred to in GN. No. 471 of 1962 relied upon by DW1 is **"Bunda- Kibera 30- Rugezi Ferry 50- Nansio"**. No evidence was adduced by the 2nd defendant through DW1 or other defence witnesses to demonstrate that, **"Bunda- Kibera- Rugezi Ferry- Nansio road"** and **"Nyamuswa- Bulamba- Kisorya road"** is one and the same.

In view thereof, I am of the humble view that, the defendants have not proved, on the balance of probabilities that the Nyamuswa- Bulamba-Kisorya road was inexistence before the plaintiffs came into ownership of the disputed land. No wonder that the 1st defendant prepared the TP Drawing which led to grant of certificates of occupancy to the above named plaintiffs. For that reasons, the first issue is answered in affirmative that, the 1st, 4th, 5th, 6th, 7th, 8th and 9th plaintiffs are lawful owner of the land in dispute. For purposes of clarity, the 8th plaintiff proved ownership of Plot No.18, Block No. L, Bunda only.

This leads us to the second issue, whether the plaintiffs are entitled to compensation. In their evidence, the plaintiffs claimed to have developed their respective plots by erecting houses thereon. Also, the 2nd Defendant's notice required the plaintiffs to demolish and remove exhausted improvement made in the road reserve (disputed land).

The defendants' evidence and Ms. Mwandambo's submissions that the plaintiffs are not entitled were premised on the assertion that, the disputed land is within the road reserve. On the other hand, Mr. Mligo argued that, since the disputed land was formalized by the 1st, 4th and 5th defendants and certificates of title issued, the plaintiffs are entitled to

compensation due to any damage suffered as a result of negligence acts of the defendants' authorized officers.

I have resolved the first issue to the effect that, the plaintiffs are lawful owner of the disputed land, save for the 2nd and 3rd plaintiffs and also the 8th plaintiff in respect of one plot. Land is real property. It has value and hence, protected by the provision of Article 24 of the United Republic of Tanzania Constitution, 1977 which provides for right to own property and protection of the property. That is why private property lying within the established or expanded road reserve is excluded under rule 2 of the Highways (Width of Highway) Rules, 1967, GN No. 161 of 1967. Furthermore, section 27 of the Highways Act [Cap. 167, R.E 2002] and now section 16 of the Roads Act, 2007 provides for payment of compensation to land owner whose land is acquired for the roads authority. Such compensation is made for the development made on the acquired land in accordance with the Land Acquisition Act [Cap. 118, R.E. 2019], the Land Act [Cap. 113, R.E. 2019] and the Village land Act [Cap. 114, R.E. 2019] and any other law.

Compensation to land acquired by the Government for public interest as in the case is governed by section 11 of the Land Acquisition Act (supra) which provides as follows in subsection (1):

Subject to the provisions of this Act, where any land is acquired by the President under section 3, the Minister shall on behalf of the Government pay in respect thereof, out of moneys provided for the purpose by Parliament, such compensation as may be agreed upon or determined in accordance with the provisions of this Act.

Guided by the above position of law, I am of the considered view that, the plaintiffs who have proved ownership of the land in dispute are entitled to compensation for the development made thereon. This is so when it is considered that the disputed land was formalized by the responsible institutions of the Government namely, the 1st, 4th and 5th defendants which went on to issue them the certificates of title. The said certificates of title have not been revoked or rectified for any error, if any. Therefore, the second issue is answered in affirmative. The 1st, 4th, 5th, 6th, 7th, 8th and 9th plaintiffs are entitled to compensation due to the foresaid reasons.

The last issue is on what reliefs are the parties entitled to. Since the Court is satisfied that, the 1st, 4th, 5th, 6th, 7th, 8th and 9th plaintiffs are lawful owner of the land in dispute, they are entitled to a declaration as such and compensation for developments made thereon. However, none of

the plaintiffs adduced evidence to prove value of exhausted improvement made on the disputed land. Thus, they failed to prove how they are entitled to TZS 1,100,000,900 claimed in the plaint.

In the final analysis, the Court hereby order as follows:

1. Elias Mwita Samo (1st plaintiff), John Mwita Chacha (4th plaintiff), Mgeri Matutu (5th plaintiff), Julius Odera (6th plaintiff), Msafiri Magirari Majige (7th plaintiff), Phares Megera (8th plaintiff), and Musa Budeba Nzugira (9th plaintiff) are lawful owner of the land in dispute to wit, Plot No. 44, Block F, Bunda Urban; Plot 194, Block N, Bunda Urban; Plot No. 202, Block N, Bunda; Plot No. 200, Block N, Bunda; Plot No. 204, Block N, Buda Urban; Plot No. 18, Block L, Bunda Urban; and Plot No. 5, Block H, Bunda respectively.
2. The 2nd and 3rd plaintiffs have failed to prove ownership of the land in dispute. Their case is dismissed for want of merit.
3. In view of paragraph 1 above, the 1st, 4th, 5th, 6th, 7th, 8th and 9th plaintiffs' lands are entitled to compensation in accordance with arrangement and agreement to be determined under the Land Acquisition Act (supra) if the defendants intends to demolish the structures alleged to have been built in the road reserve. Otherwise, prior demolition or eviction of the 1st, 4th, 5th, 6th, 7th, 8th and 9th plaintiffs, the 2nd defendant should ensure that the disputed land is

valued and the said plaintiffs paid compensation equivalent to its market value.

4. The case succeeds to the extent stated herein.

5. Each party shall bear its own costs.

DATED at MUSOMA this 19th March, 2021.



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E. S. Kisanya
JUDGE

Court: Judgment delivered in open Court this 19th March, 2021 in the presence of the 1st, 2nd, 3rd, 5th, 7th, 8th and 9th plaintiffs, Mr. Yona Shija, learned State Attorney for the 1st defendant and holding brief for Ms. Subira Mwandambo, learned State Attorney for the 2nd, 3rd, 4th and 5th defendants and in the absence of the 4th and 6th plaintiffs.



A handwritten signature in blue ink, appearing to be "E. S. Kisanya".

E. S. Kisanya
JUDGE
19/03/2021

Right of appeal to the Court Appeal is well explained.

Court: Original Certificates of Occupancy (Exhibits PA1, PA3, PA6, PA7 and PA7) and receipts (Exhibit PA7 and PA9) be returned to the respective owners.



A handwritten signature in blue ink, appearing to be "E. S. Kisanya".

E. S. Kisanya
JUDGE
19/03/2021