IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND CASE NO. 10 OF 2019

JULIUS MASAWE & 14 OTHERS ..... PLAINTIFFS

versus

TANZANIA RAILWAYS CORPORATION.....1st DEFENDANT

THE ATTORNEY GENERAL.....2nd DEFENDANT

MWANZA CITY COUNCIL .....3rd DEFENDANT

JUDGMENT

6th & 22nd September, 2021

RUMANYIKA, J.:

With respect to a stretch of land along Mwanza railway Mkuyuni Ward in the district of Nyamagana Mwanza city, the suit, pursuant to order of the court on records, the amended plaint was presented for filing on 12/3/2021 essentially, it is for orders; **(i)** That the notices issued to Julius N. Masawe and fourteen (14) Others (the plaintiffs) to demolish buildings are unlawful and unjustified **(ii)** that the plaintiffs legally occupy the plots along, and adjacent to the railway line **(iii)** that the 1st defendant and their agents be restrained permanently from entering and demolishing the

plaintiffs' buildings and **(iv)** as usual costs of the suit and any other reliefs that this court may deem just.

For avoidance of doubts the defendants are Reli Assets Holding Company, the Attorney General and Mwanza City Council (the 1st, 2nd and 3rd defendants) respectively.

Messrs Msafiri Henga and Masanja learned counsel appeared for the plaintiffs.

Assisted by Messrs Subira Mwandambo, SSA, Gati Mseti, Severina Nyalubamba and Nuru learned state attorneys, Mr. G.P. Malata, Principle state attorney (the Solicitor General) appeared for the 1st and 2nd defendants. Mr. Maliki Mweneyuni learned state attorney appeared for the 3rd defendant.

The legal issues proposed on 9/11/2020 by the parties and were adopted by court for determination they read thus: **(a)** Whether the plaintiffs' suit land encroached the railway reserve/strip **(b)** Whether the notices of demolition (the notices) issued to the plaintiffs by the 1st defendant were proper **(c)** reliefs that the parties are entitled to.

Pw1 Julius Ngalea Masawe (65) stated that vide a certificate of title (the CT) he owned a plot and house and since 1988 resided at Mkuyuni area, Nyamagana district in Mwanza City (Copy of the CT – Exhibit "P1").

It is equally important to note here that only for the reason known to the plaintiff for not attaching the copy of the CT to the plaint in this case served on the defendants it was unsuccessfully objected on 18/8/2021. I reserved the reasons therefor and here are the reasons; In fact the defendants may, or may have had the copy not been served on them before, therefore on that one the latter were taken by surprise yes, but now that the case file also contained the copy of CT and the defendants did not sufficiently question existence of the 33 years term CT but, it appears whether or not pw1 was properly granted the right of occupancy, the issue of one being taken by surprise in court therefore it should not have raised under the circumstances.

Still on oath, pw1 further stated that the CT was issued on 22/08/1989 and the plot was 15 meters away from the railway strip. That the court be pleased to declare him owner of the plot or the 1st defendant compensate him to the tune of shs. 300.0m much the notice issued by the 1st defendant was improper.

Cross examined by Mr. Malata, PSA – pw1 stated that his other names were Julius Ngalea and that from 15 meters that existed in 2018 now the strip had been extended to 30 meters.

Pw2 Swed Bakari Mziray (39) stated that with respect to the respective plot and house say 20 meters away from the railway strip but pursuant to letters of administration granted to him by Mkuyuni primary court on 20/1/2021, he administered the estate of Bakari Mziray (copy of the letters – Exhibit "P2"), copy of CT (not in the name of Bakari Mziray but Leonard Magire), a building permit and sketch map plan admitted as Exhibits "P3", "P4" and "P5" respectively that if anything, the 1st defendant compensate him with shs. 200 million for exhaustive improvements. That's all.

Pw3 Issa Jumanne (53) according to his oath and testimony since 1995 a resident of Mkuyuni area in the city, he also stated that having had purchased the plot in 1991 and built a house 16 meters away from the railway strip, but from the existing 15 it had been extended to 30 meters, only a copy of building permit was issued in 2014 by the 3rd defendant – (Exhibit "P6").

Pw4 Sarah Mosha (adult) stated that she owned a plot and resided at Mkuyuni since 1972 and, in 1985 she was allocated the plot by 3rd defendant but recently was issued a notice of demolition alleged it (plot No. 19B) was on a railway reserve (copy of the letter of offer-Exhibit "P7").

Cross examined by Mr. G.P. Malata,PSA, Pw4 stated that the plaint did not disclose the alleged one year term right of occupancy (1985 – 86) but he purchased the plot in 1995 and did not know the railway laws.

Pw5 Exaud Nathanael Minja (67) formerly employee of TRC stated that having had beyond 15 meters limit purchased the residential squatter from an elderly lady in 1989, he occupied it undisturbed until 2017 when the 1st defendant served him the notice.

Cross examined by Ms. S. Mwandambo learned senior state attorney pw4 he stated that he did not know if the doctrine of adverse possession applied under the circumstances.

Pw6 Elias Wilson Ntare (38) a resident of Mkuyuni area in the city he stated that with regard to the respective plot, say 15 meters beyond the railway strip, and in 2019 he was appointed administrator of the estate of Salome Ntare his grandmother (copy of the letters admitted only for

identification purposes as ID "P1") that they enjoyed the estate until 2017 when the 1st defendant served him the notice.

Cross examined by Mr. G.P. Malata learned principal attorney, Pw6 stated that he did not know which railway laws applied in early 1980's.

Pw7 Nicolaus Mwanga (born in 1958) stated that he built and resided in his house 15 meters away from the railway strip at Mkuyuni area Nyamagana district since 1980 and he never defaulted property tax that the court be pleased to order as such.

Cross examined by Mr. G.P Malata learned PSA, Pw7 stated that contrary to paragraph 20 of the plaint actually he acquired it as bare land and he did not know if the doctrine of recent possession applied under the circumstances.

Pw8 Anna William (born in 1951) stated that for the previous ten years she resided in her house say 15 meters far beyond the 15 meters limit from the railway strip his son having had purchased her the plot and she defaulted no property tax that she enjoyed it undisturbed until when the 1st defendant had served her the notice. She prayed the court to declare her as such.

Pw9 Yusufu Mrisho Msalangi (49) stated that he resided at Mkuyuni area Nyamagana district, Mahakama street along the railway reserve since 1988 but 15 meters away and all the time the 1st defendant recognized him until 2016 when they served him the notice (copy of the notice admitted as ID "P2") for identification purposes only.

Pw9 Hatia Mussa (43) was just dropped by the plaintiff's learned counsel.

Pw10 Peter Ernest (42) stated that since 1983 he built it in 1997 therefore owned a house and resided along the railway but 20 meters away, therefore 5 meters by far but he did not sign the plaint save for his name on the list that contrary to paragraph 20 of the plaint, with respect to the case he had no deed/CT nor did he know if he was obliged to ask for a building permit.

Pw11 Innocent Steven Chambala (23) stated that he resided at Mkuyuni area, Mahakama street since 1998 say 20 meters away from the railway line having had inherited the house from late father when he was only one year old. He asked the court to declare him as such but the signature appended to the plaint it did not belong to him.

Cross examined by Mr. P.G. Malata learned principle state attorney Pw11 stated that he did not know a destination between a railway line and a railway strip. That is all.

Dw1 Adonia Mmanywa (33) since 2015 employed by the 1st defendant as estate officer responsible to oversee land use, equipment etc. he that railway line existed during colonial rule and after independence and they had circulars and Government notices that governed its smooth operation such as since 1962 to date they had the common Engineering Manual (the Manual) which, under S.8.04 established, among others 60m either way from the middle of the railway reserves (under Section 59 (1) of the Evidence Act Cap 6 RE. 2019 copy of the East African Railways Corporation Engineering Manual Vol.1 Tech. Instructions was admitted as Exhibit "D1"). Then the Railways Acts of 1977 and 2002 and TRC Acts of 2017 and 2002 (Section 62 (2) (2)) whereby the 15m railway reserve and strip were introduced from the center sideways and respectively defined. For Urban and rural areas 15m and 30m respectively save for the trespassers in the present case since 1980 – 90s. Then against 600 plus of them, they issued the notices to the 15th plaintiff one Yusuph Mrisho Msalange in particular. On that one, but in writing having had asked the

3rd defendant to always observe the 30m limit (Letter Ref. No. Mz/10/Plot 3 of 7/6/1991) but the latter just muted. That the court declare the defendant as such.

Cross examined by Mr. Msafiri learned counsel, Dw1 stated that the Engineering manual and the TRC Act, 2002 bound all the people and operated simultaneously (S.4 of the TRC defined a railway strip).

Dw2 Engineer Oswin Matanda (53) stated that since 1994 he was civil engineer, he worked for the 1st defendant and over saw maintenance of buildings, the railway line and the entire network as per the Engineering Manual and Technical instructions standard dimensions of 1959. That a railway reserved area was 60m inclusive of a railway strip which now the plaintiffs had encroached.

Cross examined by Mr. Msafiri learned counsel, Dw2 stated that he had 27 years work experience and, according to the TRC Act, 2002 a railway strip covered 15m either side from the center but within a railway reserve of 30m.

Dw3 Engineer Tunaye Narbert Mahenga (46) currently a senior engineer who worked with the 3rd defendant he stated that he was the Ag.

City engineer and secretary to the planning committee responsible to oversee and issue building permits ordinarily for planned areas but as for Mkuyuni area subject of the case, he did not remember to whom, amongst the plaintiffs they had issued building permits. Much as one was duty bound to always observe the railway strip and reserve and, following trespass in the 1990's the 3rd defendant wrote them (Exhibit "D2"). That if anything, with regard to plot no. 34A Block II (Exhibit "P3") the doubtful CT may have had been issued to one Leonard Magilu of Mwanza who is not a party to case. Equally so with regard to plot no. 19 Block B III issued to Isack M. Lubango a stranger, also copy of the planning consent issued.

That building permits were issued according to rule 24 of the Local Government Urban Authority Act Cap 288 Regulations of 2008.

Cross examined by Mr. Msafiri learned counsel, Dw3 stated that following exhibit D2 they could not know if they replied but from there the 3rd defendant complied.

Then there followed brief final but oral submissions of the learned attorneys;

Mr. Msafiri learned counsel submitted that with 11 witnesses, the plaintiffs had proved their case on the required balance of probabilities according to CTs their property all having had been built beyond the railway strip much as the said Engineering Manual only governed internal affairs of the 1st defendant nor was the manual a piece of legislation and therefore the notices of demolition were illegally issued. That is it.

On his side, Mr. G.P. Malata learned principal attorney submitted that contrary to provisions of Sections 110,112 and 115 of the Evidence Act Cap 6 RE. 2019, the plaintiffs' case was not, on balance of probabilities proved for the reasons; **(1)** out of 15 plaintiffs only 11 of them appeared and testified in court. It means therefore, the 8th, 9th, 11th and 13th plaintiffs simply abandoned their case and the court be pleased to mark it as such **(2)** that in their testimonies, Dw1 and Dw2 had established and proved the railway strip and reserve therefore the 1st defendant's title through circulars and the technical instructions of 1962 the two having had been replaced and superseded by the East African Engineering Manual Vol. I much as, if at all the plaintiffs had acquired the plots and the TRC Act, 2002 had no retrospective effects **(3)** that with exception of the 1st and 2nd plaintiffs, contrary to paragraph 20 of the plaint no one else had proved ownership

by CT therefore the testimonies and pleadings at variance (case of **Baclays Bank (T) limited v. Jacob Muro,** Civil Appeal No 357 of 2019 (CA), unreported. Leave alone, in terms of the name the 1st plaintiff Julius N. Masawe or Julius Ngalea Masawe in 1989? (In that regard no deed pol or something) and, contrary to the law he developed the plot within a planning authority but it lacked a planning consent (case of **Director Moshi Municipal Council v. Stanlenard Mnesi & Another,** Civil Appeal No 246 of 2017 (CA) at Arusha unreported **(4)** That pw2 (the plaintiff) may have had a building permit yes, but the permit wasn't a CT or, in that regard a letter of offer **(5)** That with regard to pw3 exhibits P3 – P5 yes, but the documents only concerned with Leonard Magilu a deferent person all together leave alone Sarah Moshi (the 11th plaintiff) who too had such conflicting documents **(6)** That pw10 and pw11 had disowned the plaint for the reason that they never signed it the latters' evidence in chief not withstanding **(7)** That the pw9's claims of adverse possession were not tenable because the disputed land was, by the law for public use therefore his claims contravened the provisions of Section 38 (a) of the Law of Limitation Act Cap 89 RE. 2019 much as one pleaded no customary right of occupancy in the first place (paragraph 20 of the plaint refers). That

against the trespassers the notices of demolition were properly issued, and the latter were not entitled to compensation (case of **Tenende Budotela & Another v. The Attorney General,** Civil Appeal No 27 of 2011 (CA), unreported. That is all.

The pivotal issue now is whether the plaintiffs have proved their case on the balance of probabilities the answer is no for four reasons;

One; with exception of pw1 and pw2 whose certificates of title Exhibits p1 and p3 I shall shortly herein after come back and discuss, as it was precisely so in my considered view submitted by Mr. P.G. Malata, PSA, contrary to what had been pleaded and promised by them in paragraph 20 of the plaint, no one of them produced a CT or any equivalent documentary evidence. Now that the plaintiff's pleadings and testimonies materially varied, I would decline even to attempt and assume the plaintiffs' titles (case of **Barclays Bank (T) Limited** (supra)).

Two, all the time pw10 and pw11 had advocate in court yes, but for reasons known to them, and or to their advocate, they did not appear and testify. I think, like quietly though counsel for the plaintiffs conceded, cases of pw10 and pw11 were as good as abandoned ones much as on that one

a plaint wasn't equivalent of a sworn/unsworn evidence or affidavit of a witness by all standards.

Three, as promised before, I am now set to discuss about the pw1's and pw2's certificates of title which essentially with respect to the disputed land they presuppose a conflict of interests between the government and subjects. In fact for the reasons that shall herein after follow, both common sense and logic allowed the latter's interests to prevail always. At most the plaintiffs told the court that they did not, by fraction of any stretch encroach the 15m railway strip much as basing on the provisions of the Manual and later the Railways Acts of 1977 and 2002, no one of them sufficiently disputed the fact that 30m either side from the middle of a railway reserve also contained the 15m railway strip as defined also no one of them alleged to have acquired the plots before the manual became operative in early 1960's. If anything, whether or not, at the time the plaintiffs were aware of existence of the provisions of the law, the circulars, the technical instructions or the manual it was immaterial in my considered view.

Four, The 1st and 2nd or such other plaintiffs may have had been allocated the plots by the 3rd defendants such that on application down the

road they were issued building permits and they never ever defaulted land rent, property tax etc. yet their houses faced the demolition threat yes, now not only the point is whether the 3rd defendant had a land to allocate the plaintiffs (the Latin Maxim Nemo Dat Quod Non Habet) but also the plaintiffs risked it all. There is no wonder following trespass the 3rd defendant ignored the 1st defendant's complaint cum alert (a letter with Ref. No. MZ/10/Plot 3 of 7/6/1991). The plaintiffs were duty bound to diligently search and satisfy themselves that the plots were free of encumbrances much as they had reasons to inquire under the obtaining circumstances (see the case of **Sifael Cleopa Lobulu v. Emmanuel Ayubu Zelothe**, Land Case No. 50 of 2016 (HC)) at Arusha (unreported). It follows therefore now that the plaintiffs were aware of the existing 1st defendant's interest on the disputed land, but they assumed the risks and injuries, the former shall not be entitled to compensation because for the above stated reasons, from its inception the plaintiffs hadn't been bonafide land allocated (case of **Tenende Budotela & Another** (supra)).

I think, like it happened here, if the parties' agreements to abrogate laws, in this case the TRC Acts, Circulars, technical instructions and the Manual for that matter, and God forbid the courts of law simply blessed it,

the Queen, or at the now time the President would not have such piece of law for whatever purposes reserved.

Five; Whether deemed, or, in the case of pw1 and pw2 granted right of occupancy, but seemingly the dubious land allocation, in order to avoid both chaotic and mockery of land use and plaining, where, for instance there was direct or implied double allocation of land, unless,(**i**) in the eye of any reasonable tribunal, it was, but a result of professional negligence **(ii)** in the unlikely event the government acted ultra vires **(iii)** where, by operation of law the area was restricted/reserved and the plaintiff had no intermediate chance of inspection in which case numbers (i) (ii) & (iii) above which is not the case here, it will not be lawful for the plaintiff to sue the Attorney General, Director of the local authorities in such capacities as government officials as the case may be. As long as in that regard there was one land register, I don't think a defence of professional negligence was available on a surveyed land but the plots double allocated, or a road reserve, a railway strip/reserve for that matter for public use allocated to an individual. This one was a fit case for the respective land officers to be sued only in their personal name(s). However thin the borderline might be, the respective land officers' acts were but black

mailing or stealing to say the least. I will increasingly hold that if the doctrine of vicarious liability was intended to protect dishonest individual government's employees the legislature would not have been fair. On this one also, I think if the courts of law shall not do what had not been said by the law books, the socio-economic circumstances would always forge their way while development of the law standing still. That happening we will witness the courts' downfall. The plaintiffs now may wish to sue the respective land officers only in the latters' names and they are accordingly advised.

When all is said, I shall, as hereby do dismiss the entire case with costs. It is so ordered.

Right of appeal explained.

S. M. RUMANYIKA

JUDGE

18/09/2021

The judgment delivered under my hand and seal of the court in court this 22/9/2021 in the presence of Ms. Subira Mwandambo, learned senior

state attorney assisted by Mr. M. Mweneyuni, SA and Mr. Godfrey Martini, learned counsel for the plaintiffs.

S. M. RUMANYIKA

JUDGE

22/09/2021