IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND CASE NO. 21 OF 2021

REV'D CANON DAMASCENE YOHANA MULAVYO (RTD CAPT) ..... PLAINTIFF

VERSUS

1. **KASULU TOWN COUNCIL .....1ST DEFENDANT**
2. **TANZANIA RURAL AND URBAN ROAD AGENCY ..... 2ND DEFENDANT**
3. **ATTORNEY GENERAL ..... 3RD DEFENDANT**
4. **SOLISTER GENERAL ..... 4TH DEFENDANT**

JUDGEMENT

16/06/2022 & 25/07/2022

MANYANDA, J.

The Plaintiff in this case is claiming against the Defendants a total of Tshs. 80,000,000/= (say, Tanzanian Shillings Eighty Thousand Million only) out of which Tshs. 70,000,000/= being compensation for his demolished house located at Kimobwa area in Kasulu Town Council and destroyed trees being four palm trees, two coconut plants, 33 coffee plants, 10 banana plants, two mango trees and three Mihura trees and Tshs. 10,000,000/= general damages.

Briefly, the Plaintiff averred in his plaint that in 2013 his land at Kimobwa area in Kasulu Town Council was earmarked for construction of a road. Consequently, his land was surveyed and a strip of land valuated at Tshs. 723,356/= was taken and compensation to the said tune of money paid to him. That to his surprise on 30/03/2020 he saw his house marked with an "X" sign requiring him to demolish his house and that his more surprise, on 01/04/2020 saw his house and some tree crops being destroyed by workers of the 1st and 2nd Defendants. He protested to the 1st and 2nd Defendants in vain, hence decided to file the instant suit.

The defendants in their joint Written Statement of Defence vehemently denied all the claims by the Plaintiff.

On 16/12/2021 the Solicitor General was struck out because he is an extended arm of the Attorney General who is a necessary party, therefore there is no need of making him a party in the suit.

After mediation failed, the case came to full hearing. The Plaintiff prosecuted the case on his own unrepresented while Messrs Allan Shija, Anold Simeo and Edwin Rweikiza, State Attorneys fended the cases on behalf of all Defendants.

Three issues were drawn on census with the parties, namely: -

i. *Whether the area on which the road is constructed belongs to the Plaintiff;*

ii. *Whether the 1st and 2nd Defendants demolished the houseand destroyed plants of the Plaintiff; and*

iii. *What reliefs are parties entitled to.*

To prove his case, the Plaintiff, Reverend Canon Damascene Yohana Mulavyo (rtd. Capt.) who testified as PW1 and called one witness namely, Dickson Moshi (PW2) to support him. He, led evidence in his testimony that he owns a piece of land located at Kimobwa Hamlet area in Kasulu Township. In 2013, the 1st Defendant sought to construct a road to bitumen level which passed in the Plaintiff's land. After survey and valuation of the strip of land taken from the Plaintiff, compensation was paid to the him. The road to bitumen was constructed. This resulted into beacons and coordinates of his land given to him by the Land Officers as follows: -

a) On the right side of the suit land, Beacon "A" reads 9495607/177633 per compass and 9495603/177586 by phone. Beacon "B" reads 9495727/177671 per compass and 9495690/1776700 by phone.

b) On down side Beacon "C" is 945726/177672 per compass and 945567/177698 by phone, Beacon "D" reads 945614/177628 per compass and 9495635/177586 by phone.

That, suddenly on 30/03/2020 officers from the 1st and 2nd Defendants informed him that another road would be constructed. He found that the second road would pass in an uncompensated area. He made inquiries to the Kasulu Town Council without convincing answers. Between 30/03/2020 and 31/03/2020 his house located at the suit land was marked "X" meaning he was required to demolish the same. On 01/04/2020 the workers of the 1st and 2nd Defendants demolished the house and destroyed some tree crops along a strip of land.

PW1 testified further that according to the road regulations, the size of the feeder road reserve is 30 meters width and that it is 25 meters in Hamlets. Therefore, road reserve demarcation and construction of the bitumen road followed all the procedures, but the demolition undertaken on 01/04/2020 exceeded the road reserve and trespassed into his land, he prayed for compensation on the exceeded land which forms the suit land. It was his further testimony that after demolition of his house, no construction of any road was undertaken in the suit land, according to him demolition meant a deliberate move calculated to impoverish him.

Moreover, it was his testimony also that the demolition act caused him to suffer psychologically and mentally and physically because now he is suffering from peptic ulcers and he lost his friend who eye witnesses the demolition. Hence, he prayed for general damages as prayed in the plaint.

In cross examination, he stated that there were other persons who were affected by the construction of the road who did not claim compensation and that he just estimated the value of the house to house to Tshs. 50,000,000/= basing on construction costs, the tree crops at Tshs. 20,000,000/= and the damages he has suffered to Tshs. 10,000,000/=.

PW2 testified that the bitumen road was constructed in 2013 and followed the compensated area, then in 2020 another murram road was constructed this time in the uncompensated area of the Plaintiff.

The Defendants' evidence came from two witnesses namely, Martin Mathias Maneno who testified as DW1 and Erick Raban Ntivilonka (DW2).

DW1 testified that being a Land Surveyor of Kasulu Town Council, knows the dispute over the suit land because he once dealt with it. That the Plaintiff lodged a complaint concerning construction of the murram

road in the suit land without compensating him. That after searching in the Town Planning Drawing found that the road passed in the suit land whereas the affected area was 0.086 acre or 16 meters width and 20 meters length. That that piece of land was valuated and compensation paid to the Plaintiff between 2013 and 2014. Therefore, the compensated piece of land came under ownership of the Kasulu Town Council after compensating the Plaintiff.

In cross examination, DW1 stated that he was not present during construction of the bitumen road because he went for studies out of Kasulu. Further, he stated that, based on the documents he studied in his search after receiving the Plaintiff's complaint, both the bitumen and murram roads cover the compensated area of the Plaintiff, hence there was no trespass.

The second witness was DW2 who testified that being an Engineer was involved in the construction of the two roads, the bitumen and the murram roads. That the length of the roads is 910 meters and width of 15 meter including the road reserve. Further, he stated that there were some crops and a house along the road reserve when they constructed the road. That they held several meetings to local leaders to tell owners of land to remove their structures they constructed in the road reserve, whereas all heeded except the plaintiff who refused. Hence, they

demolished the house and the plants in the road reserve. He stated further that he knew the borders of the road reserve from the Land Officers and that the Plaintiff's claim is not correct because the demolished structures were within the road reserve.

In cross examination, DW2 stated that the road reserve stretched a width of about 15 meters. That, when he constructed the road, he did not see beacons or coordinated he followed the size of the road with 6.5 meters width. That the two roads making a double road are separated by a canal. That the compensation to the Plaintiff concerned a road reserve of 15 meters regardless of the name, hence both the bitumen and murram roads are within the compensated road reserve. That demolished structure was just a hut not a house.

After closure of evidence, both sides made short summing up of the cases which I need not to reproduce them here, but I will be referring to them in the course of my judgement.

Three issues were framed as explained above. Starting with first issue whether the area on which the road is constructed belongs to the Plaintiff. As seen above the contention by the Plaintiff is that before surveying was carried out in 2013, the suit land belonged to him. This fact is not denied by the Defendants. Therefore, it is evident that the Plaintiff owned a land which before surveying carried out in 2013,

included the land on which it was earmarked for road construction and its reserve.

The Plaintiff testified that when the road was surveyed for road construction in 2013, a piece of his land was taken away. This fact is also not disputed by the Defendants. Following that, the land which was taken away was valuated and the Plaintiff was fully compensated. The size of that land which was taken away from him for road construction, according to the testimony of the Plaintiff supported by that of DW1, was 0.086 acre or 16 meters width and 20 meters length. The Plaintiff testimony says that the road reserve in Hamlets is 25 meters and that the land was correctly taken from him after been fully compensated. It is the testimony of the Plaintiff that after compensation, a bitumen road was constructed between 2013 and 2014 and there was no any problem.

The dispute arose in 2020 when the 1st and 2nd Defendants started construction of murram road in order to make the bitumen road double road towards a hospital. The Plaintiff contends that the area on which the murram road was intended to be constructed exceeded the road reserve beyond the coordinates he was given by Land Officers in 2013. On the other hand, the Defendants contend that that area is within the

road reserve which was demarcated in 2013 and compensation fully paid to the Plaintiff.

To prove his contention, the Plaintiff led evidence that after 2013 survey and demarcation of the road reserve he was given beacons and coordinates. That the Land Officers namely Bagambi (DLDO) and Engineer Shilungu, handed to him coordinates he named as follows, on the right side of the suit land, Beacon "A" reads 9495607/177633 per compass and 9495603/177586 by phone. Beacon "B" reads 9495727/177671 per compass and 9495690/1776700 by phone. On down side Beacon "C" is 945726/177672 per compass and 945567/177698 by phone, Beacon "D" reads 945614/177628 per compass and 9495635/177586 by phone. Further that the construction of the murram road exceeded the said coordinates by twenty (20) feet. To him the bitumen road covers the area it passes only which is 25 meters width.

On the other side, the testimony of DW2 is that the murram road he constructed was a collector road, such roads requirement, according to road regulations, is 40 meters width in rural areas and 15 meters in urban areas. That although he did not use coordinates when constructing the murram road, he followed width of the road of 6.5

meters which together with the bitumen road are well within the road reserve, he did not see any beacon.

In civil cases, it is a cherished principle of law that, generally, the burden of proof lies on the party who alleges anything in his favour. This is per the provisions of sections 110 and 111 of the Evidence Act, [Cap. 6 R. E. 2019]. It is also common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.

This means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again elementary law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case. In the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017 (unreported) the Court of Appeal of Tanzania stated as follows

> *"...the burden of proving a fact, rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is*

discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...".

Putting these pieces of evidence to scrutiny I find that the Plaintiff is liable to prove that the road reserve in which the murram road is constructed exceeds the road reserve demarcated during survey exercise carried out in 2013. His testimony is that he was given coordinates after the survey which he says now have been exceeded. Going by the authority in **Paulina Samson Ndawavya's case (supra)**, a question is whether the Plaintiff has discharged his burden of proof so as to require the other side enter evidence in reply.

In my firm opinion the answer is in negative. There are two reasons for this finding: -

One the Plaintiff tells the demarcation after 2013 survey only, he does not tell the positions of the coordinate after the construction of the murram road. Are they behind or in front of the murram road? The Defendants say the murram road is within the demarcated road reserve in 2013. It was imperative for the Plaintiff to led evidence indicating the position of the coordinates he alleges was given to him after 2013

survey. In his submissions, the Plaintiff stated that the valuers who valuated the road reserve namely, Bagambi and Shilungu were not summoned by the Defendants.

With due respect, the Plaintiff is trying to shift his burden to the Defendants before he establishes, on balance of probabilities, that the coordinates were in fact exceeded, by calling the said Bagambi and Shilungu. This is contrary to the authority in **Paulina Samson Ndawavya's case (supra).**

Second, the size of the road and its reserve area is not in controversy. The Plaintiff termed the road in issue as "a feeder road" which in a Hamlet is required to have width of 25 meters. The Defendants, through the testimony of DW2 termed the road in issue as "a collector road" which in town settlement is required to have 15 meters width. DW2 testimony is that the murram road he constructed in 2020 was 6.5 meters width which together with the bitumen road constructed in 2013 makes both to be in the road reserve.

Therefore, in respect of the size of the road reserve, both, the Plaintiff and the Defendants meet at one point that the width of the road and its reserve. According to PW1 testimony is that the demarcated area during 2013 survey was 25 meters width. According to DW2, the width of both murram and bitumen roads put together is 15 meters.

Therefore, the Defendants' 15 meters width is well within the Plaintiff's 25 meters width. It is not more than 25 meters width.

In such circumstances, one can see that it is unreasonable to make a finding that the road reserve was exceeded. There is cogent evidence to that effect in this case. The issue whether the area on which the road is constructed belongs to the Plaintiff is answered in negative.

The next issue is whether the 1st and 2nd Defendants demolished the house and destroyed plants of the Plaintiff. I think this should not detain me. The Plaintiff testified that in the suit land there were some tree crops such as coffee tree banana plants, palm trees and coconut trees DW2 testified that he found some tree crops in the suit land when he started construction of the murram road in 2020.

Moreover, DW2 admitted in his testimony that there was a hut in the suit land which was demolished. Whatever name referred to by the witnesses, it remains a fact that there was a structure erected at the suit land in a form of a house which was demolished during construction of the murram road in 2020. The dispute is that, the Plaintiff was already compensated in respect of the said properties. As alluded above, the evidence indicates that the said structures were within a road reserve.

This finding takes me to the third issue that is what are the parties are entitled to. Having answered both the 1st issue in negative, it follows that the Plaintiff has no valid claims against the Defendants. On the other side, the Defendants prayed for dismissal of the suit with costs.

Basing on the findings of this Court as explained above, the suit has no merit. Consequently, I dismiss the same. Costs to be borne out by the Plaintiff. It is so ordered.

Dated at Kigoma this 25th day of July, 2022

THE HIGH COURT OF TANZANIA

MANYANDA

JUDGE