IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

LAND CASE NO. 13 OF 2017

ATHWAL'S TRANSPORT AND TIMBER LIMITED ..... PLAINTIFF

VERSUS

RELI ASSETS HOLDING COMPANY ..... 1st DEFENDANT

ATTORNEY GENERAL ..... 2nd DEFENDANT

JUDGMENT

Date: 13/5/2022 & 24/6/2022

BAHATI SALEMA, J.:

On 1st July, 2017 the plaintiff Athwal's Transport and Timber Limited was served with a 30-day notice by the first defendant Reli Assets Holding Company alleging that plots Nos. 18 and 19 (Title No 43035); No.21 (Title No 48878); No. 22 (Title No. 479674); No. 23 (Title No. 44262); No. 24 (Title No. 48817); Nos. 25 and 26 (Title No. 42818); No.27 (Title No. 43965) and No. 28 (Title No. 43966); and unexhausted

improvements all located at Block 'C' Isevya area within Municipality and region of Tabora are within the defendant's prohibited area.

Further that the plaintiff's structures on the suit plots would be demolished by the 1st defendant upon expiry of 30 days of the notice. The suit plots, godowns and building structures are used by the plaintiff and its customers for valuable business and in their entirety, the same is estimated to be worth not less than TZS 7,000,000,000/= (seven billion shillings).

The plaintiff, believing that he is the lawful owner of the disputed land, instituted a suit against the defendants seeking judgment and decree on the following orders;

1. Declaratory judgment and decree that the suit 10 plots no. 18 and no. 19 (Title No. 43035); No.21 (Title No 48878); No. 22(Title No. 479674); No 23 (Title No. 44262)No. 24 (Title No. 48817); No. 25 and No.26 (Title No.42 818) No.27 (Title No 43965) and No 28 (Title No. 43966), all located at Block C Isevya area within the Municipality and Region of Tabora are lawfully owned by the plaintiff,

2. Permanent injunction restraining the defendant, its officers, and or agents from interfering with the plaintiff's ownership of the suit

plots and or demolishing the buildings and all other developments thereon.

3. Costs of the suit.

4. Any other relief.

It is significant to point out that this matter has gone through the hands of Mallaba J, who was then transferred and taken over by Bongole J, who was then indisposed, and the case was partly heard by Kihwelo J, who was then elevated to the Court of Appeal, and I took over on 19/8/2021, where I proceeded to hear the defence side.

My gratitude goes to the predecessors for keeping the records on track on the plaintiff's side. I had an opportunity to take up the matter on the defence side since it has taken a long time.

During the final pre-trial conference, the following issues were framed for determination by this Court;

1. *Whether the suit land is a reserved land for rail purposes;*

2. *Whether the plaintiff encroached on the railway reserve area;*
3. *Whether the plaintiff had the building permit from the relevant authority prior to the building of structures in the suit plot; and*
4. *To what reliefs are the parties entitled.*

The facts of this case can be gleaned from the record as follows: the plaintiff owns the suit plots for a term of 33 years and the certificate of occupancy was duly issued by the Commission for lands bearing the title numbers as indicated hereinabove and the plaintiff has been paying the requisite fees to the government for the same. The first defendant on the other hand claims to be owning the suit land since the 1920s when the railway line was first built in Tabora.

Having briefed the facts of the case, I will now proceed to evaluate the evidence adduced by the witnesses to determine and decide on the said issues.

During the trial, the plaintiff was represented by Messrs. Method Kabuguzi and Amos Gahise, learned counsels while the defendant was represented by Mr. Lameck Merumba, Senior State Attorney.

In a bid to establish the case, the plaintiff's side called two witnesses.

PW1, Navinder Singh testified to the court that he is the Managing Director of Atwal's Transport and Timber Limited, a limited company owned by two shareholders, one of whom is him and the other is Amrit Singh. He testified further that he lives at Balewa Street in Tabora Municipality and his business is transportation and warehousing.

He stated that the dispute before the court is concerning a plot of land at Isevya area where the plaintiff has built a warehouse on ten plots that are alleged to be the property of the first defendant. The area has ten plots which are No. 18, 19, 21, 22, 23, 24, 25, 26, 27, and 28, both located at Isevya Industrial Area Block "C". He said that all plots belong to Plaintiff. He added that he has the certificates of title for all plots which have the names of the Plaintiff and they have been signed by the Assistant Commissioner and the Commissioner of the Lands.

He further stated that the process of acquiring the title deed and offer involved the payment of a number of things, including land rent, and other items necessary to acquire titles, such as registration fee, the survey fee, deed plan fee, stamp duty and land rent.

Moreover, he testified that on 1st July 2017 he received a notice from RAHCO (Reli Assets Holding Company) a defunct company that was the owner and custodian of Railway infrastructure and assets now Tanzania Railways Corporation; the notice alleged that the plaintiff company had encroached on the railway line and that it should vacate the suit land within 30 days. He then replied to their notice with a letter dated 8th July, 2017 indicating that the suit land belongs to the plaintiff company, not the defendant.

He testified that the defendant alleged that the Plaintiff Company made construction in the rail line which is not true because the plaintiff legally acquired the suit plots and that the fencing wall around the ten plots was constructed after having obtained the necessary permits from Tabora Municipality.

It was testified further that the plaintiff hired a contractor from Mwanza D. F. Ministry who sent an architect and nine surveyors from Mwanza to Tabora Municipal where they met the Land Officer, Municipal Planner, and Municipal Surveyor. All of them visited the suit land and inspected beacons and summoned neighbors, including officials from Railway (the defendant) and a surveyor from Railway (the defendant), and indicated a clear boundary between the plaintiff's plots and that of the defendant. The one who indicated the boundaries was Mwalimu. The distance between the railway line and its boundary is about fifty meters (50 meters), and the requirement is to be in the buffer zone of about 30 meters.

Further, on the suit land, there is one small godown built on two plots that have been there for more than 30 years now. Since then, they have erected a modern warehouse. They have also built an office block and an underground water tank that takes 100,000 liters for fire hydrants. He further stated that he received a building permit for the boundary wall on 8th February 2013, and the survey plan as well.

That, the building permit and the survey plan are all in the name of the plaintiff. He prayed not to be disturbed from the peaceful enjoyment of the suit premises and to be paid the costs of the case and also the costs of not being able to start the factory at the suit premises.

During cross-examination, PW1 stated that the railway line is bordered by Kasco, a construction company and that there is nothing taking place therein save for the railway truck going through the former TRC workshop.

He submitted that during the acquisition; the planning officer, municipal surveyor, and land officer were involved, along with officials of the defendant (TRC). He stated that several buildings were erected from 2013 to 2014, and thus no development was done after 2014. The distance between TRC and the suit plot is approximately 400 to 500 meters. The service line proceeds to the TRC Workshop.

He further stated that prior to the allocation of Plot No. 22 or 23, the area belonged to one Muhib Kasimbagu who had an offer letter from the Municipality. Other plots before its acquisition belonged to the Municipality but they had a small warehouse in Plot No. 18 and 19 Block "C" Isevya area Tabora and these have been there for the past thirty years (30) and his late father acquired them from the Regional

Development D (RDD) but the titles were processed by him in between 2012 and 2013.

PW2, Deo Damian Msilu, Urban Planning Officer for Tabora Municipality testified to this court that he was employed since 2010. He submitted that he came to notice the dispute as there were complaints that were brought by a number of complainants, the plaintiff being one of them complaining that the defendant has marked X on their properties and that they were required to vacate.

He submitted that in the dispute between the plaintiff and the defendant, he had to trace the survey plan and town planning drawings and came to notice that there was a town plan drawing from 1985 which led to the survey of plots in 1991 and that led to the plots which the plaintiff was allocated.

He further visited the suit area to ascertain the TRC boundaries and the plots which the Plaintiff Company has developed to include Plots No. 18 up to 28 Block "C" Isevya Area-Tabora Municipality and discovered that the distance between the boundary walls of the plots in dispute and the railway line was 50 meters. The railway line is the one that goes to the TRC workshop. He further submitted that they discovered that the plaintiff had built in the plots he was allocated and that TRC was complaining that the said buildings were built in an encroached area.

He then submitted that the TRC by then had produced a 1950 Town Planning Map, but that map does not exist at the offices of the municipality. All the town planning and survey maps are found at the Ministry of Lands where they are registered. He suggested that the responsible Ministry come and make a decision as to which of the two maps is appropriate, the one by the Municipal or the other one by the TRC. Until today, they had no answer to that.

PW2 stated further that the TRC map of 1950 was not registered by the Director of Mapping and Survey. He then stated that in the suit premises there is a big godown and a big fence wall around the area, and the plaintiff, upon request, showed them the building permit, the map, and also the title deeds for all the plots. The building permit was issued by the Municipal and the drawings were also approved.

He testified further that, according to the documents on record, the plaintiff lawfully and legally developed the suit land because he had lawful building permits and the distance between the railway line and the boundary had to be 30 meters. A buffer zone has to be 30 meters, but the distance between the boundary wall and the railway line is 50 meters.

During cross-examination, he submitted that there are two town planning maps, one from 1950 and the other one from 1985. The one

that was there before is the one with the 1950 map, which is TRC. He submitted that to date he was yet to get an answer on the validity and legality of the 1950 TRC map which the Director of Mapping and Survey is the one responsible for since the 1950 Map was not registered. He stated that according to the 1950 TRC Map, the suit plot is within the TRC area. He contended that the title deeds issued to the plaintiff went through all the processes. The plaintiff closed their case.

Next was the defence case, and the sole witness was **DW1, Adonia Stephano Mmanya** Estate Officer of the first defendant testified to this court that he works at TRC. The area in dispute is in Rufita area, Isevya. He submitted that the owner of the disputed area recognizes its land through maps which are recognized by the Commissioner for Lands. He stated that the area has a map of 1952 with reference number 8965.

He said that through the said map, the Land Commissioner had recognized the area since 1964 through a letter. He further stated that the map indicates some of the areas that can be used by other institutions if there is a need.

He further testified that the notice issued to the plaintiff to demolish the building structures from the suit land because when the suit land was inspected, they discovered that the same had been

unlawfully developed by the Plaintiff without the first defendant had been informed nor the same having given the right to develop that land.

DW1, further acknowledged that the Land Commissioner is the one who administers the land and gives the certificate of occupancy. He stated that the Commissioner through the map understands the area of the railway where the map shows the area of the railway and explains some of the areas which can be used by other institutions.

He stated that Isevya area falls under the TRC and the notice issued on 12 May, 2017 was issued purposely to demolish the disputed premises within 30 days. According to him the railway line and its infrastructure were built in 1922, He prayed to this court to give an order for the plaintiff to vacate the area and remove all the developments.

When cross-examined, DW1 stated that the TRC has no title deeds in Tabora but the area has been declared by the Commissioner to be theirs. He also identified certificate of occupancy with tittle No. 43035 issued in 2013 by Assistant Commissioner for Land for Mwanza to Navinder Singh Athwal and Tittle No. 48878, No. 42820, No. 44262, No. 4887, No. 43965, No. 42818, No. 43966 also issued by Assistant Commissioner for lands to Athwal Timber.

He also stated that he had never seen such documents before and did not know if they relate to the disputed area. He valiantly stated that

although they had provided certificates of title for the said plots between 2012 and 2013, by that time the railway and its infrastructure were already in place.

During re-examination, he stated that the Right of Occupancy No. 43035 belongs to Navinder Singh, who, according to the record, is not the plaintiff and that some of the certificates had no-issuance dates. He stated further that the first owner was TRC when they were allocated in 2013. He prayed to the court for the plaintiff to vacate their area. The defence closed its case.

Both parties made their final submissions, which this court will take into consideration when analyzing the issues.

Having narrated the evidence by the parties herein, and having gone through the final submissions made by counsels, I will now endeavor to consider the issues agreed upon and I shall be guided by the principle that; he who alleges is the one responsible for proving the allegations. This principle has been encompassed in sections 110 (1) (2) and 112 of the Law of Evidence Act, Cap.6 [R.E 2019]. It was further held in the case of ***Anthony M. Masanga vs. Penina (Mama Mgesi) and Lucia (Mama Anna),*** *Civil Appeal No. 118 of 2014 (CAT) (unreported)* that

> *"The party with legal burden also bears the evidential burden on the balance of probabilities."*

Also, in the case of ***Hemed Said vs. Mohamed Mbilu (1984) TLR 113,*** it was held that;

> *"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."*

I shall determine the issues according to the manner in which they were framed. The first issue is *whether the suit land is reserved land for rail purposes*. In their final submissions, the counsel for the plaintiff has demonstrated that the suit land is not in a reserved area. According to the plaintiff's evidence, on the suit land, there is one small godown built on two plots that have been there for more than 30 years now. Since then, they have developed a modern warehouse.

Also, he testified to the court that the distance between TRC and the suit plot is approximately 400 to 500 meters. The service line proceeds to the TRC Workshop and the suit plots are bordered by the TRC plot (defendant's plot) which is near the railway line.

As to PW2, according to his evidence, he traced the Survey Plan and Town Planning drawings and came to notice that there was a Town Plan Drawing from 1985 which led to the Survey of Plots in 1991, and that led to the plots which the Plaintiff was allocated. He also visited the suit area to ascertain the TRC boundaries and the plots which the Plaintiff had

developed from Plots No. 18 up to No. 28 Block "C" Isevya Area-Tabora Municipality and discovered that the distance between the boundary walls of the plots in dispute and the railway line was 50 meters.

He then submitted that the TRC by then produced a 1950 Town Planning Map but that the map did not exist at the Municipal office and that the TRC Map was not registered by the Director of Mapping and Survey. That, the Plaintiff being in the actual occupation of the suit land for such a long time without the Defendant demanding that the suit land be hers corroborates the evidence that the Plaintiff is a lawful owner of the suit land.

During cross-examination, PW1 testified to the effect that they were shown boundaries by one Mwadini, who was the first defendant's employee but on the contrary DW1 testified that the owner of the disputed area recognizes its land through a map with reference number 8965 of 1952 which is recognized by the Commissioner for Lands as its displays the area and boundaries. He stated further that through the said map, the Land Commissioner had recognized the area since 1964 via an official letter.

From the evidence adduced, it is my firm view that the first issue is negatively answered against the defendant. That the disputed land is not a reserved land for rail purposes. The court has considered the evidence

adduced by the plaintiff, since the 1950s map presented by the defendant, nobody came to verify that the Land Commissioner had knowledge to prove that the area in dispute was reserved land for rail.

As to the second issue on *whether the plaintiff encroached on the railway reserve area.* This issue looks so intertwined with the first issue. It is my settled view that the plaintiff did not encroach on the railway reserve when he was developing the suit land. According to PW1 and PW2 evidence, the distance between TRC and the suit plot is approximately 400 to 500 meters.

Also, PW2 testified that he visited the suit area to ascertain the TRC boundaries, he discovered that the distance between the boundary walls of the disputed land and the railway line was 50 meters while it has to be 30 meters.

It is the stance of the court that the plaintiff's evidence on record proves legal ownership of the suit land. The burden of proof, in terms of section 110(1) of the Tanzania Evidence Act, Cap.6 [R.E 2019] shifts to the defendant to prove their allegations that Plaintiff encroached upon the 1st Defendant's land. Also, Plaintiff's evidence on record is backed up with the testimonies of PW1 and PW2, which proves that the suit land was developed by Plaintiff upon a thorough observance of the beacons

and genuine building plans and permits which were duly issued by the Tabora Municipal Council.

Since the defendants have failed to adduce evidence of proof of the distance, DW1's testimony remains to be a mere verbal allegation without cogent evidence of proof. I am of the humble view that, the defendants have not proved, on the balance of probabilities that the plaintiff encroached on the railway reserve area when developing the suit land. DW1 never justified to the court that the TRC map was in existence at the suit's land before the plaintiff came into its ownership. No wonder the Tabora Municipal Council prepared the TP Drawing, which led to the grant of certificates of occupancy to the plaintiff. For these reasons, the second issue is answered in the negative against the defendants that the plaintiff did not encroach upon the railway reserve area.

Although the defendant in his final submission stated that PW1 in his entire evidence does not dispute that the plots in dispute are bordered by railway infrastructure. Taking into account the evidence of the defendant, it is my holding that the defendant has failed to adduce evidence of proof.

As to the third issue on *whether the plaintiff had the building permit from the relevant authority before the building of structures in the suit plots?*

PW1, Navinder Singh never tendered any building permits from the relevant authorities to justify the erection of structures on the disputed plots.

Upon perusal of the court records, no building permit was tendered in evidence by the plaintiff, proving that all developments on the said plots were authorized. He orally testified that he legally acquired the suit plots and that the fencing wall around the ten plots was constructed after having obtained the necessary permits from Tabora Municipality. As rightly submitted by the defendants, this is one of the requirements for any development intended to be made in the surveyed area. In the present case, the burden of proof at the required standard of the balance of probabilities is left to the plaintiff, who must prove.

Section 28(a) of the Urban Planning Act, of 2007 read together with Regulation 124(1) (c) of the Local Government (Urban Authorities) Development Control, 2008 provides thus;

> *"No person shall erect or begin to erect any building until he has obtained from the authority a written permit to be called a building permit."*

The above position of law was reinforced in the case of **Director Moshi Municipal Council V Stanlenard Mnesi and Roisiepiece Sospeter**, Civil Appeal No. 246 of 2017, where the court also quoted section 29(1) of the Town Planning (Planning Areas) Act, 2007 which imposes a requirement for planning consent from a planning authority before making any development in the planned area.

Therefore, as noted from the evidence, the plaintiff never tendered any building permit or planning permit but in his evidence, he orally stated that the ten plots were developed after having received the necessary permits from Tabora Municipality. Therefore, the developments that were effected on the disputed plots were unjustified.

This leads me to the fourth issue *what relief are the parties entitled to.*

Before dealing with the last issue on relief to the parties, I find it necessary to comment on a number of things that became apparent in the course of the hearing. I should state that there appear to have been errors on both sides. The TRC and Tabora Municipal Council appear to have been careless in safeguarding public properties. It is hard to comprehend that there had been encroachment on the area for over 30 years.

The defendant's witnesses were not even aware of the present occupier of the disputed plot, despite the buildings being in use for over 30 years. That demonstrates a high degree of inattention in the protection of public property even though DW1, Adonia Mmanywa, an estate officer, claimed that the land in dispute was TRC property since 1922 but failed to justify or prove at the required standard. Further PW2, Deo Damian Msilu, Urban Planning Officer, testified to the court that they allocated the said land to the plaintiff and issued them the building permit.

These weaknesses in land management systems have led the Plaintiff to believe that they were entitled to ownership of the disputed plot, as the Plaintiff legally and conclusively proves the suit land with Exhibits P1 which comprises a total of 8 certificates of occupancy pertaining to the suit plots at Block "C" Isevya area which were allocated in 2013.

I also need to speak on the issue raised by the defendant that the plaintiff ought to have joined the Tabora Municipal or the Commissioner for Land as it was in the case of ***Tanzania Railways Corporation (TRC) V GBT Limited,*** *Civil Appeal No. 218 of 2020.* I understand that the claimant is the one who chooses whom to sue. I find this has no basis since the plaintiff's witness, Deo Damian Msilu is an urban planning officer from Tabora Municipal; so in the instant circumstance, the issue of joining the

Tabora Municipal as a necessary party is redundant because of the nature of the case and the relief claimed.

That said, it is the finding of this Court that the plaintiffs have managed to prove their case on the balance of probability. In this case, the plaintiff's evidence appears weightier than that of the defendant.

Since the plaintiff's claim is mainly centered on the alleged notice of demolition, no such notice was ever tendered in evidence to prove which exact plots the notice was directed at. Therefore, the plaintiff was duty-bound to give cogent evidence regarding the notice and to what extent did the notice affect each plot for the court to know before granting declaratory order. In absence of such evidence, the plaintiff has failed to discharge its duty as per Section 110 of the Evidence Act, Cap. 6 [R.E. 2019].

As to whether the relief claimed by the plaintiff can be sustained. Since the Court is satisfied that the place was not a reserved land for railway and the plaintiffs did not encroach on the railway line, they are entitled to a declaration that they are lawfully occupiers of the suit land and owners of developments made thereon. Considering the peculiarity of this case, I direct that each party bears its costs.

Order accordingly.

A. BAHATI SALEMA

JUDGE

24/6/2022

Judgment delivered in chambers under my hand and seal of the court in the presence of Mr. Amos Gahise, learned counsel for Plaintiff and Mr. Amos Gahise learned counsel hold in brief of Mr. Lameck Merumba Senior State Attorney for the Defendant through a virtual court link.

A. BAHATI SALEMA

JUDGE

24/06/2022

Right of appeal is hereby explained to the parties.

A. BAHATI SALEMA

JUDGE

24/06/2022