IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

LAND CASE NO. 04 OF 2019

1. **SAMSON MANG'OMBE**
2. **JOSEPH MANG'OMBE** ..... **PLAINTIFFS**
3. **THOMAS MANG'OMBE**

VERSUS

1. **THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND HUMAN SETTLEMENTS DEVELOPMENT**
2. **THE PRINCIPAL SECRETARY, IN THE PRESIDENT'S OFFICE, MINISTRY OF REGIONAL ADMINISTRATION AND LOCAL GOVERNMENT** ..... **DEFENDANTS**
3. **TANZANIA RURAL AND URBAN ROADS AGENCY (TARURA)**
4. **THE ATTORNEY GENERAL**
5. **THE SOLICITOR GENERAL**

Date of Last Order: 29.11.2022

Date of Judgment: 15.12.2022

JUDGMENT

KADILU, J.

This suit was filed in this court by the plaintiffs claiming against the defendants jointly and or severally for declaratory orders that the demolition of the plaintiffs' residential house and six small commercial huts situated in Sikonge Mission by the 3rd defendant is illegal. They also claim for payment

of special damages at the tune of Tshs. 94,000,000/= being the value of the demolished structures. The facts of the case can be paraphrased from the pleadings and evidence on record thus; on 13/2/2019, the 3rd defendant demolished the plaintiffs' estate consisting of a residential house and six small commercial huts situated in Sikonge Mission within Sikonge District in Tabora region without proper notice.

The plaintiffs came in possession of the demolished estate from their parents who were given the same by the Moravian Church in 1957. The plaintiffs in their plaint stated that land rent for the suit property was paid for 100 years, but the receipts could not be traced in recent years. They thus resumed payment of land rent in 2010 for which they attached the receipts as annexure "P5." The plaintiffs further alleged that on 19/1/2018, the 3rd defendant's officials wrote the word, "ONDOA" literary meaning, "remove" on the plaintiffs' structures. Thereafter, the estate was demolished on 13/2/2019 without any further notice alleging the same were constructed along the road reserve.

The plaintiffs consulted a registered valuer from Nzega District Council to evaluate the said estate before demolition and came out with a value of Tshs. 94,000,000/= being the value of the said house and six commercial huts. The plaintiffs' Advocate served the defendants with a demand letter and notice of intention to sue on 12/4/2019, but they did not respond or compensate the plaintiffs. The plaintiffs claim that the demolition was illegal and has rendered them and their families homeless with collapsed economic

structures and failure to support their families in terms of education, health and basic needs.

The demolition is alleged to have further caused unnecessary inconveniences and mental torture to the plaintiffs therefore, they demand Tshs. 94,000,000,000/= as special damages and Tshs. 50,000,000/= being general damages. In their plaint, the plaintiffs prayed for judgment and decree against the defendants as well as costs of this suit. On the other hand, the defendants in response to the plaintiff's claims, have filed a written statement of defence in which they denied all the claims by the plaintiffs. They asserted that the plaintiffs' ownership of the suit premises is not well substantiated by any instrument of transfer. Hence, the plaintiffs are the trespassers on the land in dispute.

The defendants stated further that the plaintiffs' claim that they were bequeathed the suit property by their parents is not evidenced by any instrument of transfer recognised in law. That being the case, they have no right to be compensated for the demolished structures. The defendants aver that the plaintiffs were adequately informed of the intended demolition, but refused to act accordingly like other residents of the area in dispute and that is why among all the residents of Sikonge Mission, it is the plaintiffs alone who have sued complaining about the demolition. They prayed the court to dismiss the suit with costs.

It is important to point out from the outset that, this matter has also gone through the hands of my brother Hon. Amour, J. before the case was assigned to me in November, 2022. I thus heard the testimonies of the witnesses for the parties and now have to evaluate the evidence to determine and decide on the raised issues. At all the material time, the plaintiffs were represented by Mr. Lucas M. Ndanga, learned Advocate, while the defendants were represented by Ms. Mariam A. Matovolwa, learned Senior State Attorney.

In consultation with the Advocates for the parties, the following issues were framed by this court:

(i) *Whether the plaintiffs are the lawful owners of the disputed land.*
(ii) *Whether the defendants lawfully demolished the plaintiffs' commercial huts on the disputed land.*
(iii) *Whether the plaintiffs are entitled to any compensation of the disputed land.*
(iv) *Whether the disputed land was a road reserve.*
(v) *To what reliefs are the parties entitled.*

Pursuant to Order XVIII Rule 2 (1) and (3) of the Civil Procedure Code Cap. 33, (Amendment of the First Schedule) Rules, G.N. No. 776 of 2021, the court ordered the trial to be conducted by way of witness statements in which each witness's statement was filed to the court prior to the hearing. To prove their case, the plaintiffs had five witnesses, Mr. Samson Yuda Mang'ombe who testified as PW1, Mr. Francis Mfaume Mayunga, who testifies as PW2, Mr. Muhulo Katema Mgonela, who testified as PW3 and Mrs. Naomi Zabroni Kaswaka who testified as PW4. PW 5 was Mr. Yesaya

Saimon Kiligito whose witness statement was filed, but he could not come and testify before the court due to sickness.

Moreover, the plaintiffs tendered two exhibits to wit; two action pictures of the demolition exercise which were marked collectively as "P1" and valuation report, "P2." The Defendants had two witnesses who filed their statements, but one witness; Mr. Martin Simon Ukongo could not come to court and testify as he was on study leave during the trial. Thus, Mr. Timothy Z. Jambi was the only defence witness who testified as DW1. The defence side tendered five photographs showing the disputed area before and after the demolition and they were marked collectively as exhibit "D1."

I have observed that both the plaintiffs and defendants in this case had attached numerous exhibits in their pleadings, but just a few of them were tendered during the trial. I wish to state here that since such exhibits were not admitted in evidence, they cannot be acted upon to decide the present case. It is trite law that a document that is not admitted in evidence cannot be treated as forming part of the record even if it is found among the papers in the record. That was also the decision of the Court of Appeal in the case of ***Chantal Tito Mizary & Another v. Ritha John Makala & Another***, *Civil Appeal No. 59 of 2018 (Unreported).* In the case *of* ***Shamsa Khalifa & Two others v. Sulemaim Hamed Abdallah***, *Civil Appeal No. 82 of 2012 (Unreported),* the court observed thus:

> *"We are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in*

this case, to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold this led to a grave miscarriage of justice."

PW1 through his statement which was adopted by this court testified that he started owning the suit property in 1960s after having inherited it from his parents. He stated that Moravian Church gave all its workers plots so as to construct houses and live near working place. PW1 told the court that his parents were among the Church servants who were allocated land in that style. When asked if he has any proof of ownership, he said he has a letter and an affidavit of the bishop confirming his ownership as in that transaction, there were no documents of transfer which were executed. Admission of the letter and an affidavit of Moravian Church confirming these facts was objected as they were copies rather than original.

He avers that a day before the demolition, he saw the words "ONDOA" on his house. He inquired from TARURA District offices where he was told, "*Tutavunja*" meaning, "We will demolish." The house was demolished a week later when he was at shamba and when he came back, he found them demolishing. After informing them that he had no notice of demolition, the officers stopped the demolition exercise. He told the court that up to the time of the trial, his family is residing in a partly demolished house. He stated further that, at first the plaintiffs were claiming for compensation of Tshs. 200,000,000/= but TARURA promised to pay them Tshs. 25,000,000/=. They then conducted a valuation and found the value of their estate is Tshs.

94,000,000/= thereafter TARURA declined its readiness to compensate the plaintiffs.

Witness statement of PW2 was also adopted by the court in lieu of his evidence in chief. As he had no exhibits to tender, he was cross examined by Advocate for the defendants based on his statement filed earlier in court. He stated that the plaintiffs' families were not the first to live in the said demolished house. Earlier in 1957, there was one missionary teacher who lived in it. After they entered into the house, they renovated it. He explained that he did not hear any announcements about demolition, neither did he see the word "ONDOA." He told the court that apart from the residential house, there were six commercial huts which were demolished. No other houses were demolished in their area. He said he did not know the reasons for demolition.

Witness statement of PW3 was also adopted before he was cross examined. He narrated that although there are several houses that were marked with the word "ONDOA," including Moravian Church huts, they are not yet demolished to date. It is the plaintiffs' house and huts alone which were demolished. He stated that he did not hear any announcement about demolition, he only saw the word, "ONDOA." He elaborated that the demolished properties were in commercial and residential area, not a road reserve because there are no beckons or any other signs showing that it is a road reserve.

PW4 had a testimony resembling those of PW1, PW2 and PW3. She told the court that she witnessed the demolition. No other houses in their area were demolished except the plaintiffs' house and huts. She explained that the plaintiffs' family was given a small torn house which they re-constructed and built commercial huts. She said she was also given a plot by Moravian Church but at that time there was no evidence of ownership.

DW1 on his part stated that the plaintiffs had encroached into road reserve. The word "ONDOA" was followed by notice informing persons who have constructed in the road reserve to remove their structures. Along with the notice, a car moved around Sikonge reading out the same notice which was printed. The in the announcement, TARURA gave a time frame for voluntary demolition and informed the citizens that after expiry of that time, TARURA would demolish all structures found in road reserve. Some people demolished their structures voluntarily within 21 days, but the plaintiffs did not. He stated further that the plaintiffs went to their office seeking clarification about the intended demolition on 28/12/2018, and it was provided to them before demolition on 13/2/2019.

He explained that part of plaintiffs' house which was demolished was a veranda. The plaintiffs' house was built by using mud and burnt bricks. The road in question is not new, rather a long-time road in Sikonge. When he was asked whether the plaintiffs deserved compensation, he replied that they did not since they were trespassers in the road reserve. He was also asked about the signs which indicated that the disputed land was a road

reserve. He replied that there are no signs, but the width of the road is 20 metres so the plaintiffs built in the road reserve.

Having presented the testimonies of both parties and considering the submissions of the learned Counsel for the plaintiffs and the learned State Attorney, I now determine the issues formulated for determination in this case. I will be guided by the principle set forth in civil litigations. Section 110 of the Evidence Act, [Cap.6 R.E 2019] places the burden of proof on the party wishing the court to believe his testimony and pronounce judgment in his favour. Section 110 (1) of the Act provides:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."*

Similarly, in the case of ***Hemedi Said v Mohamedi Mbilu*** [1984] TLR 113, it was held that *"he who alleges must prove the allegations."* From the foregoing, let me now confront the first issues as to whether the plaintiffs are the lawful owners of the disputed land. It is not disputed that the plaintiffs' family has been in occupation of the suit property from 1950s. The record shows that for all that time there was no problem about their ownership over the land. The plaintiffs showed how their parents got the land in dispute and after death, they left the disputed land to the plaintiffs. The plaintiffs failed to prove their ownership of the land by documentation. This appears to be a common phenomenon in Sikonge Mission area as all witnesses who testified indicated that they also own land in the same style

as the plaintiffs. Some of them told the court that they have sold their land without having documents of ownership. To quote the words of PW2 (77 years old man) when asked whether he still owns the land allocated to him by Moravian Church, he stated: "*Niliuza. Sikuwa na nyaraka. Tunauza kiholela tu.*" It is on record that the plaintiffs used to pay land rent of the suit property since the year 2010. That is not to say that paying land rent in respect to the area in dispute validates or approves ownership of the encroached land, but nobody has ever claimed to be the owner of the land in dispute before, except the plaintiffs.

The fact that the plaintiffs' land is not surveyed to entitle them with documents of ownership cannot by itself take away their right of ownership over land. It is my considered view that the plaintiffs' land was not demolished because the plaintiffs were not the owners. Even though that was the case, the demolition not sanctioned by the court order could not be justifiable. That said, I am satisfied that the plaintiffs are the legal owners of the land in dispute after having obtained the same from their parents.

Addressing the fourth issue on whether the disputed land is a road reserve, it is not disputed that there are no beckons which were installed by the defendants indicating that the suit property is a road reserve. DW1 (Engineer from TARURA, Sikonge District) testified that the suit premise was constructed within 20 meters from the center of the road. According to Regulation 29 (1) (e) of the Roads Management Regulations, G. N. No. 21 of 2009, the road reserve width for community roads is 25 metres consisting

of 12.5 metres from either side of the center-line of the road way. Thus, the road in question having 20 metres width, any building outside 10 metres from the centre of the road is not in the road reserve as there are still an allowance of 2.5 metres before the reserve. This explains the reason why the only part of the plaintiffs' house which was demolished is the veranda. In the light of the findings above, I conclude that the disputed land is not a road reserve within the meaning of the law.

I now focus on the second issue about whether the defendants lawfully demolished the plaintiffs' commercial huts on the disputed land. It appears to be the gist of the plaintiffs' claim that the 3rd defendant did not issue a demolition notice as required by the law. PW1 testified that he lived in the disputed house from 1960s up to the year 2019 when the 3rd defendant demolished the house without issuing a proper notice. PW1 further testified that apart from the word "ONDOA" written on his house, there was no any other notice before the demolition. It was also the testimony of PW2, PW3 and PW4 that the 3rd defendant's officials did not issue any particular notice to demolish the plaintiffs' house for the reason that it was constructed in the road reserve.

DW1 in his testimony contended that the 3rd defendant issued a 21 days' notice of demolition. It also wrote the word "ONDOA" which remained on the plaintiffs' house up to now. The plaintiffs sought clarification from the 3rd defendant's District offices about the intended demolition, but they did not demolish the structures voluntarily. All these testimonies indicate that

the plaintiffs had notice about the demolition nonetheless, they decided to exhibit inaction. It is my considered view that the 21 days' notice and the mark "ONDOA" was required to be adhered to by the plaintiffs.

Having found that the plaintiffs had notice of demolition, the next question is whether the demolition was lawful. I hasten to answer this issue in negative as the issuance of notice is not the only condition which was required to be fulfilled by the 3rd defendant before the demolition. For the demolition to be lawful, all the requirements of the law have to be complied with. In case of any disagreement between the parties, the matter was supposed to be referred to the court of competent jurisdiction for determination before a forceful demolition. To conclude this issue, the court rules that the defendants' demolition of the plaintiffs' commercial huts was unlawful.

The third issue is whether the plaintiffs are entitled to compensation. One of the objectives of the Land Act under section 3 (1) (g) is to pay full, fair and prompt compensation to any person whose right of occupancy or recognised long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State under this Act or is acquired under the Land Acquisition Act. The plaintiffs have tried to establish their case and justify compensation. They are claiming for specific damages and have relied on their testimony on the Valuation Report (Exh.P2).

However, throughout the trial, it has not been shown that the Valuation Report was approved by the Chief Government Valuer who is a masterpiece

in producing an authentic Valuation. Section 7 of the Valuation and Valuers of Registration Act of 2016, empowers the Chief Government Valuer to approve or disapprove the valuation report or visit the property which is a subject of valuation for verification. In case the Chief Government Valuer is not satisfied, he may order another registered valuer to conduct the valuation. Therefore, the plaintiffs are entitled to compensation but, they were required to comply with the requirement stipulated under section 7 of the Valuation and Valuers of Registration Act of 2016 to justify their claim.

The last issue is about the reliefs to which the parties are entitled. The plaintiffs are claiming for general damages at the tune of Tshs. 50,000,000/=. The position of the law is clear when it comes to the award of general damages. It is in the discretion of the court. Lord Dunedin in ***Admiralty Commissioners S. S. Susguehann*** (1926) AC 655 on page 661 stated that:

> *"If the damage is general, then it must be averred that such damage has been suffered, but the quantification of such damage is a question of the jury."*

Applying the above authority in the case at hand, the plaintiffs were duty-bound to prove the amount claimed. PW1 in his testimony failed to prove the damage they allegedly suffered. Therefore, it is my considered opinion that this prayer has failed.

For the aforesaid findings, I declare the plaintiffs the lawful owner of the disputed land. The demolition by the defendants was unlawful. Plaintiffs are entitled to compensation after compliance with proper valuation procedures. Each party to bear its own costs.

It is so ordered.

KADILU, M.J.,

JUDGE

15/12/2022

Judgement delivered on the 15th Day of December, 2022 in the presence of Mr. Lucas Ndanga, Advocate for the plaintiffs and Ms. Mariam Matovolwa, Senior State Attorney.

Right of appeal is fully explained to the parties.

THE HIGH COURT OF TANZANIA

KADILU, M. J.

JUDGE

15/12/2022.