

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT TABORA

LAND CASE NO. 20 OF 2020

JOHN GEORGE MDAKI.....PLAINTIFF

VERSUS

RELI ASSETS HOLDING COMPANY LIMITED.....DEFENDANT

.....
JUDGEMENT
.....

Date of Last Order: 2/12/2022

Date of Delivery: 15/12/2022

AMOUR S. KHAMIS, J:

The plaintiff, John George Mdaki on 30th May, 2017 was served with a 30 days notice by the defendant ordering him to demolish his developed structures on the suit land alleged to have encroached the boundaries of Railway strip. Plaintiff alleged to have been living and developing the suit premises uninterrupted for over 26 years.

The plaintiff alleged to be the lawful owner of the suit property, he has therefore instituted this suit, seeking from the defendant the following reliefs: -

1. *Declaration that the suit premises is not within the Railway strip.*
2. *Declaration that plaintiff is the lawful owner of the premise and not a trespasser.*
3. *General damage.*
4. *Specific damage at the tune of Tshs.Ten Milion Thousands Only (10,000,000/=)*
5. *Interest on decretal sum at the bank rate from the date of judgment until payment in full.*
6. *Costs of the suit borne by the defendant*
7. *Any other relief that the court may deem fit and just to grant.*

On the other hand, the defendant in his written statement of defence strongly disputed plaintiff's claim. Defendant alleged to be lawful owner of the suit land since 1912 when railway line was constructed in Tabora. He therefore prayed for the suit to be dismissed.

During final pretrial conference parties agreed on that four issues be determined by the court to resolve the dispute. The agreed issues were;

1. *Whether the plaintiff lawful acquired the suit property.*
2. *Whether the plaintiff trespassed and encroached area reserved for railway strip and railway services.*
3. *Whether the plaintiff developed the suit property.*
4. *To what relief are the parties entitled.*

At the hearing of this suit both parties were dully represented by learned counsels whereas the Plaintiff was represented by Mr. Kanani Chombala learned advocate while the defendant enjoyed the services of Ms. Mariam Matovolwa Learned Solicitor General.

To prove the allegation plaintiff invited one witness called Veronica John Mdaki and one exhibit.

PW1 wife of the plaintiff testified to the effect that the disputed plot was allocated to the plaintiff by Tabora Municipal council in 1991whereby Tittle Deed was issued. A copy of title deed with Tittle Number. 11810415 plot No. 7 Block Coronation Road was tendered in court as **exhibit P1**.

She added that the plaintiff saw an advertisement on a newspaper then he went to Tabora Municipal Council and apply for the plot in dispute whereby he was allocated the same.

PW1 narrated that they have been occupying of the said land undisturbed for more than 26 years until 2017 when the defendant issued to the plaintiff notice to demolish the development structure in the suit land.

PW1 testified that on 30th May,2017 was served with 30 days notice from who required him to demolish his structures on the allegation the same was constructed within the boundaries of the railway strip. She testified that they marked plaintiff's house and garage with X. **PW1** averred that they have been in occupation of the disputed land over 26 years.

PW1 testified further that upon allocation of the suit land they have constructed a house and a garage. She stated that neither notice of cancellation nor revocation was issued to the plaintiff.

On the strength of her testimony **PW1** prayed for the court to grant the plaintiff's prayer as prayed in the plaint.

Defendant through her witness **Adonia Stephano-DW1** testified that the land is the property owned by the Railway company Ltd since 1912 when the construction of the railway line was completed in Tabora.

DW1 testified that the land was allocated to the defendant in 1964 by the Commissioner for Land for use of roads and the said land has remained under the occupation of the defendant to date

DW1 alleged that Tanzania Railway Cooperation has never entered any agreement with Tabora Municipal council and has been severally communicating with Tabora Municipal Council in respect of the boundaries of the dispute land.

Copy of correspondence letters between TMC and TRC were tendered as exhibit DE1, DE2, DE3, DE4 and DE5 respectively.

DW1 testified that upon inspecting its boundaries they noted that the plaintiff has constructed the house in the land belongs to the defendant.

Having analysed the evidence obtained from the witnesses and exhibits tendered, in resolving the issues framed, beginning with the first issue as to whether the plaintiff lawfully acquired the suit property, my view is, this is a question of evidence.

The law is well settled that whoever alleges must prove. Section 110 of the Law of Evidence Cap 6 [R.E 2019] reads;

- (i) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he asserts must prove those facts exists.*
- (ii) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

In observations by Sarkar's Law of Evidence 18th Edn., MC. Sarkar, S.C. Sarkar and P.C Sarkar, published by Lexis Nexis, it was observed at page 1896 as follows;

"..... the burden of proving a fact rest 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."

The plaintiff tendered exhibit P1 to prove that he acquired the and in dispute in 1991 vide grant of right of occupancy. Exhibit was supported by evidence of PW1.

On the other the defendant claimed to be the lawful owner of the suit land. His claim was supported by testimony of DW1 and he tendered the following nine (9) exhibits.

1. *Township drawings No. tr 8965 exhibit DE1,*
2. *Letter by acting town clerk to Commissioner for land dated 30/4/1964 exhibit DE2,*
3. *Letter by District Engineer East Africa Railways and Harbours to the Commissioner for Land dated 19/06/1964. Exhibit DE3*
4. *Letter by District Engineer East Africa Railways and Harbours to the Commissioner for land dated on 10/04/1964 exhibit DE4*
5. *Letter by Commissioner for lands to the East Africa Railways and Harbours, Exhibit DE5*
6. *Letter by District Engineer East Africa Railways and Harbours (Tanganyika section) to the Commissioner for Land, Dar es salaam dated 20/04/1965, exhibit DE6*
7. *Letter by Commissioner for lands to the District Engineer East Africa Railways and Harbours, Dar es salaam dated on 5/07/1965 Exhibit DE7*
8. *Letter by District Engineer East Africa Railways and Harbours to the Commissioner for land dated on 19/05/1964 exhibit DE8*

9. Letter by Acting Chief Engineer to the Commissioner for lands dated on 9/07/1965. Exhibit DE9.

Having scrutinising the testimony and exhibit tendered. It is not disputed that the said suit in dispute is registered in the name of plaintiff. So, plaintiff is the registered owner of the interest or estate as clearly stated under **section 2 of the Land Registration Act, Cap 334 RE 2002**. It reads: -

"Owner" means, in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered."

The defendant has not tendered any document to prove his ownership over the suit property apart from tendering correspondence letters which does not show the specific area which the defendant alleged to have own. The exhibit DE1 does not give the defendant ownership over the land. It is just a map which explain some areas in town plan. Plot no 7 which is the subject matter in this suit is not expressly shown in **Exhibit DE1**.

The defendant has not given any concrete evidence to the effect the occupant of the suit land. The defendant in their testimony have alleged to have been allocated the land in dispute

by commissioner for land but this allegation was never proved by any documentary evidence. In the absence of supporting evidence the court cannot rely on a mere allegation.

However, at this juncture I am guided by the Court of Appeal decision in similar case of **TANZANIA RAILWAYS CORPORATION (TRC) VGGP(T) LTD, CIVIL APPEAL NO. 218 OF 2020 (CAT – TABORA)** wherein at page 9 – 10 of the typed judgment, the Highest Court of the Land pointed out that:

“ At the outset we wish to make a point that, for reasons that will become obvious in a while, we appeal based on the grounds raised but to some extent, on submissions made by counsel the pleadings and some evidence adduced at the trial. We have decided to shelve the grounds of appeal as indicated, because at a shallow level it looks like the dispute arose from construction of the buildings targeted by the demolition notice and that the parties involved are only the appellant and the respondent but at a deeper level, at the bedrock, the underlying issue that the trial court ought to have sought to resolve was the legality or lawfulness of allocation of the dispute property to the respondent. That is so because going by the pleadings, the issue was not whether construction of buildings was lawful or unlawful, rather it was whether vesting ownership to the respondent of the land where the buildings are erected was lawful. Therefore a great deal of the discussion to follow will be whether the issue of legality of vesting

ownership to the respondent by land allocating authorities would be completely resolved without having the said land allocating authorities as parties to the suit”.

At page 10 of the typed judgment, the Court of Appeal further pointed out that:

“Our close scrutiny of the evidence of witness before the trial Court and submission of the parties in Court, revealed that in order to completely and exhaustively resolve the dispute between the parties a lot more information was needed not from the appellant or the respondent, but the official land authority that granted title to the respondent”.

In page 17 of the typed judgement, the Court of Appeal held that:

“In the upshot and for the foregoing reasons, in exercise of this Court’s powers of revision conferred upon. It by Section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019, we set aside the entire proceedings and judgment of the trial Court and direct that Land Case No. 9 of 2017 be set down for trial after the commissioner for Land or Kigoma Ujiji Municipal Council whichever granted she disputed land to the respondent shall have been joined as a party to the suit under Order 1, Rule 10 (2) of the CPC”.

In paragraph 4 of the plaint in the present case, the plaintiff averred that:

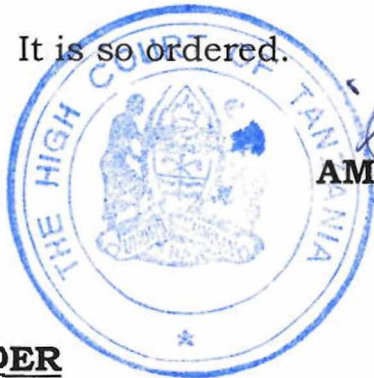
"4. That the plaintiff acquired the said suit property by being allocated by the Tabora Municipal Council in 1991 and on the plaintiff obtained a certificate of Right of Occupancy for tenure of 33 years from the Commissioner for Lands".

On strength of the above reproduced judgment of the Court of Appeal, the Tabora Municipal Council and the Commissioner for Lands are necessary parties in this suit.

It seems to me that presence of such parties is necessary in order to enable this Court effectually and completely adjudicate upon and settle all question involved in the present suit.

For the aforestated reasons, the suit is struck out with no order for costs.

It is so ordered.



AMOUR S. KHAMIS.

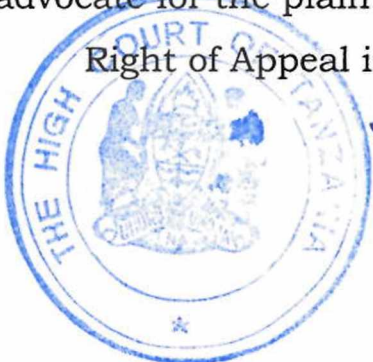
JUDGE

15/12/2022

ORDER

Judgement delivered in the open Court in presence of Ms. Agnes Simba holding brief of Mr. Kanani Chombala, learned advocate for the plaintiff and in absence of the defendant.

Right of Appeal is explained.



AMOUR S. KHAMIS

JUDGE

15/12/2022