

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT DAR ES SALAAM**

**(DISTRICT REGISTRY)**

**LAND CASE NO 67 OF 2011**

**KINONDONI MUNICIPAL COUNCIL.....PLAINTIFF**

**VERSUS**

**ANTHONY MASANZA .....1<sup>st</sup> DEFENDANT**

**STARA MPONDA.....2<sup>nd</sup> DEFENDANT**

**JUDGMENT**

16<sup>th</sup> May & 6<sup>th</sup> June 2023

F. H. Mahimbali, J

This suit involves Kinondoni Municipal Council as plaintiff against Anthony Masanza and Stara Mponda as defendants for trespass on Plot no 615, Block F Msasani area. It has been alleged/claimed by the plaintiff that the said disputed plot is an open space owned by the Kinondoni Municipal Council in which it was temporarily erected ward office (Ward Executive Office) of Msasani which then following the said trespass by the defendants, it was demolished by the order of

Kinondoni District Land and Housing Tribunal in execution of its decree in Land case No. 363 of 2009.

Due to that alleged trespass and unlawful demolition, the plaintiff through this case prays for the following reliefs:

1. Payment of Tanzania shillings 71,000,000/= as special damages for unlawful demolition of the plaintiff's office ,
2. Payment of Tanzania Shillings 100,000,000/= as the general damages.
3. Declaration that the plaintiff is the lawful owner of the suit plot.
4. Interest of the decretal sum at the rate of 12% from the date of judgment up to the full payment.
5. Costs of this suit to be born by the defendant.
6. Any other reliefs as this court deems just to grant.

The defendants jointly through their Written Statement of Defense, denied all the alleged facts as presented; and prayed for dismissal of this case with costs. In essence, they claimed that they are lawful owners of the suit premises and that the said alleged demolition is lawful as per DLHT's order in execution of land application No. 363 of

2009 at Kinondoni DLHT in which was determined in favour of the defendants. Thus, the plaintiff is stranger to the claim.

As agreed earlier by the parties themselves, the trial of the case was ordered to be held by filing witnesses' statements. In compliance to this order, the plaintiff duly filed his witness statements on time as well as the 2<sup>nd</sup> defendant though the said filing by defendants looked like simultaneous i.e before the closure of the Plaintiff's case nevertheless the second defendant seemed to be comfortable with it. However, the 1<sup>st</sup> defendant did not file his witnesses' statements as agreed and ordered. As per that default, the case proceeded ex parte against the first defendant as he even waived any subsequent appearance in court.

It is also in record that this is a partly heard case and one of the backlog cases in this registry. It has been re-assigned to me in efforts of combating backlog cases in the registry, thus taking over from where it ended from the former trial judge pursuant to order XVIII, Rule 10 of the CPC, R.E 2019 in which both parties had no reservation upon this re-assignment order and transfer of the case to me.

During the hearing of the suit, the plaintiff was represented by Mr. **Thomas Mahushi** learned state attorney, whereas the 2<sup>nd</sup> defendant was represented by Mark Lebba, learned advocate.

In his testimony PW1, Emmanuel Fumbuka Segeja after his witness statement was dully adopted by the court, he testified that the plaintiff (Kinondoni Municipal Council) is the rightful owner of the suit premise with **Plot no 615 Block F Msasani**. That originally, the said plot was being owned by M/S TOTAL ENERGIES LIMITED through Certificate of Right of Occupancy No 120056 before it was revoked by His Excellency the President of the United Republic through the notice of revocation dated 20<sup>th</sup> March 1991. That after the said revocation, the suit premise became the open space and under full control of the plaintiff. That in the said course, the plaintiff in 2004 erected office building for Msasani Ward Executive Office worth 71,000,000/= and running its business there.

To his surprise, the defendants purporting to claim ownership of the said suit premises, instituted land case application no 363/2009 DLHT at Kinondoni against the Gilbert Mushi (the then Executive Officer of Msasani ward) and Hits Excellent Com (T) LTD on which the defendants were declared as the rightful owners of the suit premises through which then, the execution of the said judgment by the said DLHT commenced and the plaintiff's building in which the Msasani WEO's office had been operating its business was demolished by the order of the DLHT.

To his knowledge, PW1 stated that the filing of the said suit (Land Application No. 363 of 2009) at the DLHT against Mr. Gilbert Mushi (then WEO) in his personal capacity and Hits Excellent Com (T) Ltd in the absence of the lawful owner – Kinondoni Municipal Council was legally unjustified as they were not lawful owners of the suit place in the presence of GN 148 of 2003 (exhibit P1 of the case) which declared the area as an open space and owned by the plaintiff.

He clarified that the defendants' execution process before the DLHT at Kinondoni for demolition of the plaintiff's existing office was unlawful as per law, therefore the reliefs sought in the plaint be granted as prayed in line of GN 148 of 2003 admitted as exhibit P1.

On her part, Ms Stara Mponda (2<sup>nd</sup> defendant) testifying as DW1 after she had prayed to adopt her witness statement, stated that the suit premise (Plot No. 615 Block "F" Msasani area) is jointly owned by the first defendant and herself after they had jointly acquired it since July 1990 following the allocation by the then Dar es Salaam City Commission.

Though not clear as what has been the use of the said area from the time they purport allocation to them, but later that in 2009, they noted their land invaded by strangers: Gilbert Mushi and Hits Excellent Com.

(T) Ltd and successfully filed a suit in Kinondoni DLHT via Land Application No. 363 of 2009. Later in April 2010, in executing the said DLHT's decree, the erected building was demolished by the trial tribunal's order.

DW1 on the other hand admits that the plaintiff in this case was not a party to that former case. However, she maintained that the suit plot is theirs as per law. Though they have no right of occupancy certificate in their possession establishing the said ownership, she keeps on insisting that the said land is theirs as they have a copy of letter of offer purportedly issued by the then Dar es Salaam City Council with Ref. No. DCC/LD/43261/3/WKC, dated 4<sup>th</sup> July 1990. Nevertheless, the said offer certificate was not admitted for want of legal compliance of tendering secondary certificate.

In establishing her ownership over the said land, she tendered default judgment of Land Application No. 363 of 2009 (admitted as exhibit D1), land rent payment receipts (exhibit D2), survey plans for plot no. 615, Block F printed on 17<sup>th</sup> November 2022 (Exhibit D3). In all these, she concluded her testimony saying that since all the land rent payment receipts are issued by their names as lawful owners, why then claiming that the said suit land is an open space? As the said plot in July 1990 was legitimately allocated to Anthony Masanza and Stara

Mponda (defendants) and the defendants are paying annual land rents billed to them by relevant authorities, she wonders how now the plaintiff claims possession of it. On these bases, she prayed that the suit by the plaintiff as baseless. It is baseless because as they successfully sued Gilbert Mushi and the Chief Executive Officer of Hits Excellent Com (T) LTD at DLHT Kinondoni through land application No 363/2009 and the defendants were declared as the right owners of the suit plot no 615 Block F Msasani area. Thus the plaintiff's claims in this suit are unfounded and accordingly the plaintiff is not entitled to any compensation of 71,000,000/= or to general damages of 100,000,000/= or to be declared owner and controller of Plot No. 615 Block F Msasani area in that respect.

In determining this suit, six issues were preferred as compass direction for the determination of the case, namely;

- 1. Whether the land in dispute was earlier allocated to Total Tanzania limited.*
- 2. Whether Total Tanzania Limited ownership was revoked by the president*
- 3. Whether the land in dispute plot no 615 block F Msasani Village has ever been allocated to the defendants.*
- 4. Who is the lawful owner of plot no 615 block F Msasani Village*



5. *Whether the demolition of plaintiff property on plot no 615 Block F Msasani Village was lawful.*

6. *To what reliefs are the parties entitled to.*

On determination of the first issue *Whether the land in dispute was earlier allocated to Total Tanzania limited*, digest of the plaintiff's evidence suggests that Plot No. 615 Block F was formerly allocated to M/S Total Tanzania Energy, with the certificate of occupancy No 120056. Nevertheless, there was no such evidence adduced in court to establish that assertion. It was just a mere saying. The law is, who claims must establish (See section 3(2)b, 110 and 111 of the TEA Cap 6 R.E 2022 and in the case of **HEMEDI SAID VS MOHAMED MBILU (1984) TLR 113 - HC**). That only a party with heavier evidence is the one who must win. After a digest to the testimony by the plaintiff's case, there is no any evidence to establish that the said Plot No. 615 Block F was earlier owned by Total Tanzania Energy as suggested by the plaintiff.

I am abreast to the rule of the law of evidence under section 119 of the Evidence Act, Cap 6 R.E 2002 that.

*"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who assert that he is not the owner"*



The importance of this legal phenomenon has been commented by M.C. Sarkar and S.C. Sarkar's Law of Evidence in India, Pakistan Bangladesh, Burmar Ceylon at page 2003, 17<sup>th</sup> Edition, volume 2 that

*"This section embodies the well – known principle of ownership. Possession of property movable or immovable, affords prima facie presumption of ownership as men generally own property they possess. Possession is a good title against anyone who cannot prove a better (title).*

Fitting the above comments by the legal scholars and the position of our Law with the facts of this case, it is obvious that the plaintiff has a duty to prove that the defendants were not allocated the said land but M/S Total Energy and the same was her right of occupancy revoked and the land then become the plaintiff's property on use as open space area which evidence is wanting. This is because there was no legal evidence in record that the ownership by Total Tanzania Energy was revoked by the president as alleged. That the President of the United Republic of Tanzania made revocation through his notice dated on 20<sup>th</sup> March 1991 could not be validly established as per law in consideration of the fact that the said plot is still registered in the name of the defendants and are dully paying relevant rents to the respective land offices (Kinondoni

Municipal Council and Ministry of Lands -- See exhibit D2). This means that the relevant authority still recognizes the defendants as occupiers of the said land in dispute despite the alleged revocation.

Assuming that the President might have revoked the said ownership as alleged, the timing of the said revocation and possession of the said land by the defendants comes into conflict with the said alleged revocation if really is effective. I say so because, if the defendants were owners of the said land since 1990, the revocation of it from MS Total Energies was not an effective notice/instrument against the defendants in the absence of due notice. Thus, my findings as to the available evidence in record, there is nothing by the plaintiff establishing that prior to the purported revocation, the said land was not owned by the defendants but MS Total Energies who was neither a witness to this nor party on that fact.

On the issue *Whether the land in dispute Plot No. 615 Block F Msasani has ever been allocated to the defendants.* According to the plaintiff's evidence in record, propping on exhibit P1 (GN 148 of 2003) which provides that plot no 615 Block F, Msasani area is the open space which is under the control of Kinondoni Municipal Council is in my considered view in conflict with the unchallenged evidence by the

defendant that the said land is theirs since 1990 and that they are still paying necessary land rents to the relevant authority (See exhibit D2). Which evidence then is superior to the other?

The assertion that the said plot was owned by M/S TOTAL TANZANIA ENERGIES LTD but his certificate of occupancy was revoked by then President is in my considered view unestablished fact as per circumstances of this case digesting together the evidence in exhibit, D.2 and D.3.

The argument that demolition made by the defendants to the built structure by the plaintiff in the disputed plot on the basis of land case application no 363/2009 before Kinondoni DLHT in which the plaintiff was not a party is arguably interesting. It is interesting because, so long as that judgment is unchallenged, however legally erroneous, it can be executed as done. I say so basing on what has been earlier testified by the defendants the suit Plot no 615 Block F, was allocated to the defendants as co -owners since July 1990 by the then Dar es salaam City Commission and the defendants are paying annual land rents (See exhibit D2).

Since the demolition of the claimed property by the plaintiff resulted from the execution of the tribunal's decree issued (in Land Case

Application No. 363 /2009 by DLHT- Kinondoni, in the case between the defendants and Gilbert Mushi and the Chief Executive Officer Hits Excellent Com), unless that decree was legally challenged, it is forceful as per law. The plaintiff cannot in my considered view in the existence of that decree, chase its execution by filing this current suit. What they were supposed to do upon being aware of the existing of DLHT's decree which was made exparte, was to challenge it as per law. This current suit cannot in my considered view be a substitute of that legal effect. In any way it could have been had there been, stronger evidence than of the defendants, in which then this court would have assessed the facts and evidence in that case through its proceedings and judgment in comparison to the present case.

In land issues the one with title is assumed to be the rightful owner of the disputed plot unless the contrary is established. Since that the defendants allege ownership of the suit plot as the co-owners as legally allocated to them by the then relevant authority of Dar es Salaam City Commission, the denounce of that letter of offer though not admitted as exhibit for legal reasons, so long as it is pleaded, the assertion by the plaintiff that the said defendants obtained that document by forgery and the relevant plaintiff's employees were

terminated from their work on disciplinary measures on account of that fact, in the absence of that proof it remains a mere assertion. Worse of the matter, since the defendants are validly paying annual land payments today, unless the contrary is established, the alleged forgeries have not been established as per law and therefore can hardly be accorded any weight as per law. It is a mere assumption, which in law accords no any evidentially value /weight.

Having said so, in a total consideration of the evidence in record, my response to issue number three *Whether the land in dispute Plot No. 615 Block F Msasani has ever been allocated to the defendants*, I am of the firm view that in consideration of the whole available evidence in record, I am of the view that in priority principle as between the plaintiff and the defendants, ownership of the disputed plot (Plot No. 615 Block F Msasani area) is more validly owned by the defendants than the plaintiff (See **Bhoke Kiatangita Vs Makuru Membe**, Civil Appeal No. 222 of 2017 and **Ombeni Kimaro V. Joseph Mishiri t/a Catholic Charismatic Renewal**, Civil Appeal No. 33 of 2017, CAT unreported).

On the relevant issue number four, as *who is the rightful owner of plot no 615 Block F Msasani*, basing on what has been discussed above, ownership to the plot no 615 block F Msasani as per established facts is

clear that it is in the hands of the defendants. Considering the fact that the duo defendants have good title, unless the contrary is established, they are the ones in control of it as opposed to the plaintiff.

I am alive that according to law, a court of law does not grant ownership of land to people but only declares as per available evidence, who between the two disputant parties is the rightful owner of the suit land. As the defendants have at least copies of ownership documents of the disputed plot and are still paying necessary land rents today, and that it appears the respective government land offices also recognize Plot No 615, Block F as being validly owned by the defendants, the averment that the said suit plot is owned by the plaintiff is unsupported by any evidence. I have thus no good basis to rule otherwise as wished by the plaintiff.

On the last issue, *Whether the demolition of plaintiff property on plot no 615 Block F Msasani Village was lawful.* There is no dispute that the office of the plaintiff was demolished as per 2<sup>nd</sup> defendant's evidence in court but the same was sanctioned by the execution order of the trial tribunal as per demolition order dated on 19/4/2010 by the DLHT at Kinondoni. The law is, a court order remains lawful unless it is invalidated by another superior order and therefore it must be obeyed.

Contrary view will have the undesired effect of creating an impasse in the conduct of trial. The rationale behind the law is not only to protect the orderly administration of justice from being abused but also to maintain public trust of the supremacy of the rule of law as well (See **Yusuphu Shaban Luhumba Vs. Happyness John and 3 Others**, Civil Application No. 304 of 2022, CAT at Shinyanga).

Since the DLHT's decree remains unchallenged, it is capable of being executed as done. The plaintiff's grievance that the suit proceeded *ex parte* against wrong parties cannot be remedied by filing another case with weaker evidence but one with stronger and convincing evidence than the former. In that way, would have won the mind of the Court. Otherwise, that decree remains valid as per law and is executable as done.

In the case at hand, as per facts of the case and in the existence of the DLHT's decree, the defendants did not wrong in enforcing their decree dully awarded in the absence of contrary situation as alleged.

*To what reliefs are the parties entitled to*, is a discussion in issue no. 6. After a clear analysis of evidence (above) as per available facts and issues of the case, the final conclusion is that, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are rightful owners of Plot no 615 block F Msasani Area and



consequently, the plaintiff's case is thus hereby dismissed with costs for want of establishing evidence.

DATED at DAR ES SALAAM this 6<sup>th</sup> day of June, 2023.



F.H. Mahimbali

**Judge**

Judgment delivered today the **6<sup>th</sup> of June, 2023** before me in the presence of the 2<sup>nd</sup> defendant only, others being absent and Ms. Aurelia Bahati RMA, present in Chamber Court.

Right of appeal explained.



F.H. Mahimbali

**Judge**