IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

LAND CASE NO. 19 OF 2017

HARUNA MOHAMED ABEID .....1ST PLAINTIFFF

PETER MOSES MOWO.....2ND PLAINTIFF

SEIF IDDI.....3RD PLAINTIFF

RAMADHAN THABIT SAID .....4TH PLAINTIFF

VERSUS

TANZANIA RAILWAYS CORPORATION.....DEFENDANT

JUDGMENT

Last Order: 29/9/2023
Date of Judgment: 17/11/2023

MASABO, J.:-

The plaintiffs herein alleges that they are lawful owners of parcels of land identified as Plot No. 1 Block L, Plots No. 6 and 8 Block M, Plot No.8 Block L, and Plot No. 8 Block K, respectively, all within Manyoni Town (the suit plots). They are enraged by the notices served upon them by the defendant (then trading as Reli Assets Holding Company Ltd (RAHCO) in July 2017 by which they were required to demolish their houses and vacate from the said plots because they have encroached into the railway reserve area. Vindicating their ownership, they have moved this court for declaratory orders that they legally own the suit plots and an order restraining the defendants from interfering with their ownership or in the alternative, they be paid compensation to the tune of Tshs 437,000,000/=; that is Tshs

120,000,000/= for the first plaintiff; Tshs 75,000,000/= for the second plaintiff; Tshs 49,000,000/= for the third plaintiff and Tshs 193,000,000/= for the fourth plaintiff.

The defendant ardently refuted the claims. They alleged that the suit plots are within 30 meters of the railway reserve area and hence belong to her and not the plaintiffs who have unlawfully encroached into it.

At the final pre trial conference, the following two issues were framed as issues for determination: - (i) whether the plaintiffs are lawful owners of the disputed lands; and (ii) to what reliefs are the parties entitled to.

It is trite law that, the burden of proof lies on the person who alleges the existence of a certain fact. This is the essence of section 110(1) and (2) of the Law of Evidence Act, Cap 6 R.E 2022. Therefore, the plaintiffs herein being the ones asserting ownership of the suit land were duty bound to prove their ownership of the same on the balance of probabilities which is the standard of proof in civil suits such as the one at hand (see **Registered Trustees of Joy in The Harvest vs Hamza K. Sungura,** Civil Appeal 149 of 2017) [2021] TZCA 139 TanzLII).

Substantiating their claim during the hearing the plaintiffs led by Mr. Deus Nyabiri, learned counsel has five witnesses who are, Ramadhani Thabit Abeid, the fourth plaintiff (PW1), Lawrence Stephano Ntiruhungwa (PW2), Peter Moses Mowo, the second plaintiff (PW3), Haruna Mohamed Abeid, the

first plaintiff, (PW4) and Pili Sefu (PW5) who is the personal representative of the 3rd plaintiff. In addition, they produced several documentary exhibits including certificates of title, exchequer receipts in respect of land rent and the notices requiring them to vacate the suit plots.

Briefly, from the plaintiffs' evidence, it is deciphered that the suit plots are in a surveyed area. In 1973, which is approximately 12 years before the construction of Singida – Manyoni railway, the suit plots were formally allocated to the plaintiffs, their parents or relatives from whom they derive their claims. From this period, the registered owners entered occupation of the plots, erected houses therein and have since then been domiciled in such plots. In mid-1980s, the Government made a decision to construct the Manyoni- Singida railway. Plots found within 15 meters from the railway track was declared railway reserve area and processes for their compulsory acquisition ignited. The persons affected were identified and compensated so as to relocate from the railway reserve. Those compensated include the 2nd plaintiff's father, Moses Mowo who was then running Fourways Hotel and PW2. The plaintiffs herein were not affected as their plots were outside the railway reserve area. Surprisingly, between 2016 and 2017 the defendant issued them with notices requiring them to demolish their lawfully erected and owned buildings and vacate from their plots as she asserted that these plots were within the railway reserve.

The defendant was represented by a team of learned State Attorneys, comprised of Ms. Jenifer Kaaya, Mr. Camilius Ruhinda, Ms. Jane Kassanda,

Mr. Omary Ngatanda and Ms. Kumbukeni Kondo. She has two witnesses who are Adonia Stephano Mmanywa, an estates officer at TRC who testified as DW1 and Mariam Mavunde, A land Officer at Manyoni District Council who testified as DW2. None of these witnesses were present during the allocation of the plots in the 1970s and during the acquisition and compensation made by the first defendant in 1985. Their evidence was wholly based on documentary evidence admitted as Exhibit D1, a letter by the first defendant to the Executive Director for Manyoni District dated 27/9/1984 expressing its intention to compensate the persons who were within the railway reserve described as an area measuring 60 meters (30 meters to the right and 30 meters to the left of the railway line). A schedule for compensation dated 28/9/1985 shows a list of 32 people who were due for compensation of the total sum of Tshs 1,250,220/=. Among them was Alois Ntiruhungwa who was to be compensated Tshs 220, 000/=; Moses Mowo Tshs 402,780/=; and Lazaro Mohamed Tshs 90,000/= (Exhibit D2).

Other documents tendered were a payment voucher for Tshs 1, 250,220/= dated 1/11/1985 (Exhibit D3); A payment schedule containing the list of 31 persons due for compensation and signed by the said persons in acknowledgment of compensation. Alois Ntiruhungwa, Moses Mowo, and Lazaro Mohamed are listed and their respective sum above appears against their names and so is their thumbprint (Exhibit D4). Exhibit D5 is a letter from the first defendant dated 11/12/1986 lamenting that Four Ways Guest House and Ujenzi house had not been demolished in spite of payment of compensation to the owners and it demanded that they be demolished.

Exhibit D6 has similar lamentations. It also indicated the amount paid in respect of Luhende Hotel by Alois Ntiruhungwa (Tshs 220,000/), Four Ways Hotel by Moses Mowo (Tshs 402,780/=), and Historia Hotel (part) by Lazaro Mohamed (Tshs 90,000/=).

Further to this, a bundle of three letters dated 15/3/1988 directed to the persons above requiring them to vacate the area as they have been paid was tendered and admitted as Exhibit D7 collectively. Exhibits D8 and P9 relate to Plot No. 6 and 8 Block M. All are from Manyoni District land office and were all directed to Moses Mowo. The first letter dated 24/10/1984 (Exhibit D8) served to inform him of the cancellation of the title deeds for the two plots following the impending construction of the railway. Exhibit D9, a letter dated 1987, is right in the opposite as it notified him about the ongoing processes for allocating him a long-term lease over the two plots and land rent payable.

Considered holistically, the evidence from both parties appears to have a consensus that in 1985 the land owners along the Manyoni-Singida railway were required to enter vacant possession as their plots were found to be within the railway reserve. They also agree that there was payment of compensation to persons affected. The variance is in respect to the size of the railway reserve, the plots affected and eligibility for compensation. The plaintiffs assert that the railway reserve had a size of 30 meters, that is 15 meters to the left and 15 to the right of the railway track hence their plots which are situated 20 to 25 meters away from the railway track were not

affected. Inversely, the defendant asserts that the railway reserve had a size of 60 meters that is, 30 meters to the right and 30 to the left. On the list of those affected, the plaintiffs' case is that the fact that their names were not listed in the schedule of payment tendered by the defendant, is a further demonstration that their plots were not affected as, had they been affected their names would have been in the list. For the defendants, it has been advanced that the list should not be used as conclusive proof for plots affected as it only encompasses the names of persons who have developed their plots hence eligible for compensation. Persons such as the plaintiffs herein who had not developed their plots were not listed as they were not eligible for compensation.

With this summary, I will now move to the issues for determination. The first issue is at the epicenter of this suit. It requires this court to determine whether the plaintiffs have proved their ownership of the suit land. In determining this issue, I prefer to start with the second plaintiff, Peter Moses Mowo. His assertions are that he is the owner of Plot No. 6 and 8 Block M, both at Manyoni Urban for which he is seeking the indulgence of this court to declare him as the rightful owner. However, to the contrary, his oral testimony as PW3 and the testimony of PW2 show that he is not the owner of the two plots. The two plots belonged to his father Moses Mowo who is now deceased. Also, save for the letter of eviction which is addressed to him, and the land rent receipt bearing the name of P Moses Mowo (Exhibit P3), all the documents he produced in support of his claims bear the names of Moses Mowo.

The immediate question therefore is whether these two documents suffice as proof of his ownership of the two plots. The answer is certainly in the negative as the eviction letter cannot provide such proof and so is the land rent receipt. Dealing with a relatively similar question in **Registered Trustees of Joy in The Harvest vs Hamza K. Sungura** (Civil Appeal 149 of 2017) [2021] TZCA 139 TanzLII, the Court of Appeal instructively held that a receipt showing that the plaintiff was paying rent in respect of the suit land cannot legally be considered conclusive documentary proof vesting title or conferring ownership of the said land into that person. Therefore, the second plaintiff is precluded from relying on the receipt.

I may also add that not only has the second plaintiff failed to substantiate his claim but the competency of his claim is questionable. It appears to contradict the elementary legal principle that suits in the enforcement of a right or interest held by a deceased person can only be brought in a representative capacity by a grantee of letters of administration (see section 71 of the Probate and Administration of Estate Act, Cap 352 and decisions of the Court of Appeal in **Malietha Gabo vs. Adam Mtengu** Civil Appeal No. 485 of 2022 [2023] TZCA 17318 TanzLII and **The Registered Trustee of SOS Children's Villages Tanzania vs. Igenge Charles and 9 Others,** Civil Application No. 426 of 2018 [2022] TZCA 428 TanzLII). The second plaintiff herein produced no proof that he was a legal representative of his deceased father and when cross examined, he said he did not have. With this evidence at my disposal, I have concluded that the second plaintiff has miserably failed to prove his ownership of the suit plot.

The remaining three plaintiffs have, in addition to other evidence, rendered certificates of title in substantiation of their ownership of the suit property. Because of this, I have found the provision of section 2 of the Land Registration Act, Cap 334 RE 2019 as a perfect entry point. This provision defines the owner of registered land as a person in whose name the land is for the time being registered. This provision has been applied in a plethora of authorities among which is **Salum Mateyo v Mohamed Mateyo** [1987] TLR 111 where it was held that

> "... proof of ownership is by one whose name is registered".

Also relevant is the decision of the Court of Appeal in **Nacky Esther Nyange vs. Mihayo Marijani Wilmore and another,** Civil Appeal No. 2017 of 2019 (Tanzlii) where it was held that;

> "...the Certificate of Title is conclusive proof of ownership of land".

With this guidance, I have carefully examined the three certificates of title rendered by the first, third, and fourth plaintiffs, respectively and their respective oral testimonies. Starting with the first plaintiff, Haruna Mohamed Abeid he testified as PW4 and had his title deed admitted as Exhibit P4. The same is registered in the name of Haruna Mohamed 'Abed' and Yusuf Mohamed 'Abed'. A slight difference is exhibited in his last name and the last name of the first registered owner of the title deed. As no clarification was given on whether Haruna Mohamed 'Abed' is the same as Haruna Mohamed 'Abeid', it can be assumed that these two are different persons.

In the alternative, and even if I were to consider this difference minute as it only involves one letter hence ignore it, the details in the title deed betray him as they are inconsistent with the pleadings. Paragraph 3(a) of the plaint shows that Plot No. 1 Block 'L' is owned by Haruna Mohamed Abeid and it was previously owned by Seleman Mohamed (now deceased). No where is the name of Yusuf Mohamed Abed pleaded in the plaint. It is intriguing how the first plaintiff remembered to mention the name of the previous owner of the plot but forgot to mention the name of his co-owner. Even his evidence in chief was silent about Yusuf Mohamed Abed. PW4's first mention of Yusuf Mohamed Abed was during cross-examination when answering a question posed to him by the defendant's counsel as to the whereabouts of Yusuf Mohamed Abed whereby, he simply stated that Yusuf Mohamed Abed he was at Manyoni.

Interestingly, even though the first plaintiff was cross-examined about this person, he saw no need to summon him as a witness to clear the doubt cast by the defendants in the course of cross-examination. In the foregoing and much as it is not the duty of this court to force the said Yusuf Mohamed Abed to defend his interest in this court, the 4th plaintiff's non-disclosure of the co-ownership is disturbing and so is his failure to summon Yusuf Mohamed Abed as a witness. Considered conjointly these two facts attract an inference adverse to the first plaintiff that had he summoned Yusuf Mohamed Abed, he would have testified against him. I have come to this conclusion because, in my strong view, the said Yusuf Mohamed Abed was a material witness as only this person could have clarified the relationship

between the title deed and the present case, a fact that has remained blurred.

In my further scrutiny of his documentary evidence, I have observed a discrepancy between the first plaintiff's name and the name appearing in the eviction notice (Exhibit P5) which is the kernel of the cause of action. The addressee in Exhibit P5 is Haruna Mohamed Mwenda and not Haruna Mohamed Abeid, the first plaintiff herein. In his examination in chief, PW4 told the court that the name appearing in the notice is his as Mwenda is his fourth name. However, no deed poll or other form of evidence was produced in substantiation. The connection between this document, the certificate title and the first plaintiff himself has remained unproved and so its linkage, if any with the case.

It is a cardinal principle of law in our jurisdiction that the parties are bound by their pleadings. They are not allowed to present a case contrary to their pleadings. Applying this principle in the case of **Martin Fredrick Rajab vs. Ilemela Municipal Council and Synergy Tanzania Company Limited,** Civil Appeal No. 197 of 2019 [2022] TZCA 434 TanzLII the Court of Appeal cited a persuasive authority of the Court of Appeal of Kenya **David Sironga vs. Francis Arap Muge and Two Others [2014] Ekir** in which it was stated thus:

> And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that

> which it has pleaded without due amendment being made. [the emphasis is added].

In a previous decision in **Makori Wassaga vs. Joshua Mwaikambo and Another** [1987] TLR 88, the Court of Appeal stated thus:-

> A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case. [the emphasis is added].

Therefore, the first plaintiff herein was bound to produce evidence consistent with what was pleaded in paragraph 3(a) of the plaint and the whole of the plaint including his name. For the reasons above stated, I have found him to have miserably failed to substantiate his claims.

The 3rd plaintiff's certificate of title (Exhibit P7), appears to have been issued on 1st July 1973. By this deed, the right of occupancy was vested into the 3rd plaintiff for one year renewable annually until terminated by any of the parties. As part of the conditions, he was required to pay land rent to the tune of Tshs 12 subject to vision by "Bwana Ardhi" (the Commissioner for Land). When these conditions are considered in conjunction with Exhibit P8 collectively which shows that the third defendant continued to pay land rent up to 2016 when, according to PW5, he was told not to pay the rent anymore as the plot would be taken by the defendant, they attract a presumption that as of this time, the suit plot was still under the ownership of third plaintiff.

The fourth plaintiff is not the original owner of the suit plot. In line with his oral testimony, the certificate of title he produced in support of his claims was registered in the name of Mahmoud Issa as its first owner. By this title deed, the said Mahmoud Issa who is allegedly the 4th plaintiff's uncle (now deceased) was granted a 33 years tenure over the suit property commencing from 1973 meaning that it was due for expiry on 2006. However, it appears that it did not as the certificate (Exhibit P1) bears an endorsement by Dodoma Land Registry showing it was renewed for further 33 years which shall expiry in 2039. Further to the endorsement of the renewal, there are two subsequent endorsements dated 25/5/2016 by which the title deed was transferred from its first registered owner to Clemence Issa and subsequently to Ramadhan Thabit Said, the fourth plaintiff herein. Going by the authorities above as to the proof of registered land, it can be fairly concluded that the fourth plaintiff is the registered owner of the plot.

The defendants have invited this court to hold that, the third and fourth defendants no longer own the suit plots as their ownership of the same ceased in 1985 after their plots were found to be within the railway reserve. As already stated, the defendant's evidence in support of this assertion comprised of the oral testimonies of their two witnesses. I have appended no weigh to this evidence as I have found it to be devoid of any value. None of these two witnesses was present in 1985 when these two plaintiffs allegedly lost their title to RAHCO. Apart from the documents they have tendered in court they have no personal knowledge of what transpired. Therefore, unless supported by the document, their assertion that the 3rd

and 4th plaintiff's ownership of their respective plots ceased in 1985 after the said plots were found to be within the railway reserve is merely hearsay which has no evidential value. Similarly unworthy is their assertion that the owners of these two plots were ineligible for compensation for want of development. This narration is correspondingly hearsay.

As to the documentation rendered, Exhibit D1 shows that the railway reserve had a size of 30 meters from the railway track. Unfortunately, it is silent as its legal basis. To unravel the truth, I have carefully read the relevant law starting with the Tanzania Railway Corporation, 1977 which was in force in 1985. However, it is silent on this issue. Its successor, the Railways Act, 2002 shades some light. It described the size of the railway reserve (rail strip) to mean the land on both sides of a railway track measuring, in urban areas, 15 meters and in rural areas 30 meters from the centre line of the track. Section 2 of the Railways Act, 2002 which was repealed by the Railways Act, 2017 described the size of the railway reserve (rail strips) to mean the land on both sides of a railway track measuring, in urban areas, 15 meters and in rural areas, 30 meters from the centre line of the track. Only after the enactment of the Railways Act, 2017 did the size of the rail strip for urban areas ascended from 30 meters to 60 meters, that is 30 meters from the centre line of the railway track on each side.

Be it as it may, the 3rd and 4th plaintiffs cannot be held to have encroached into the railway reserve as the railway found them legally occupying the plots. It follows that, if at the construction of the railway in 1985 it appeared

that the designated 15 or 30 meters railway reserve stretched into Plot No. 8 Block L and Plot No. 8 Block K and thereby making them candidates for compulsory acquisition, the owners of such plots ought to benefit from the provisions of the Land Acquisition Act. This Act sets out the conditions to be complied with in similar circumstances. Among other things, it requires that when a parcel of land is due for compulsory acquisition for a public development project such as construction of public infrastructure, there should be a notification to the persons likely to be affected and payment of compensation to the eligible land title holders (see sections 6, 7, 11 and 12 of the Land Acquisition Act).

The defendant has invited me to find and hold that Plot No. 8 Block L and Plot No. 8 Block K were among the affected plots but their respective owners were not compensated as they were ineligible. While I entirely agree with them that eligibility for compensation is dependent upon the improvement done to the respective land, it would be a lucid error for this court to ground a finding in favour of the defendant while there is no concrete evidence in substantiation of her proposition. It is an elementary legal principle that court decisions must be founded on evidence as opposed to assumptions, conjuncture and speculations. In the circumstances, I decline the defendant's invitation as the finding in favour of her preposition would be merely based on assumption, conjuncture and speculation.

My inclination to this position is not farfetched. From the schedule of payment and the correspondences contained in the documentary exhibits

rendered by the defendant, it is crystal clear that the plots owned by the 32 persons listed therein were found to be within the railway reserve and their respective owners were compensated for the improvements they have affected in such plots. None of the documents show that Plot No. 8 Block L and Plot No. 8 Block K were affected or that there were no improvements therein and their respective owners were consequently ineligible for compensation. In my firm view, the defendant's proposition could have stand if there was a separate list comprising the names of all the persons affected and their respective plots, a sketch map drawn in 1980's showing that these two plots were found within the railway reserve or in the alternative, a cancellation of the respective rights of occupancy, but none was tendered. For these reasons, the defendant's assertion fails

That said and done, this suit partially succeeds to the extent that the claims by the first and the second plaintiffs are dismissed whereas the claims for the third and fourth plaintiff succeeds.

Without prejudice to the above, I have asked myself what is the plight of the third and fourth plaintiff under the Railway Act, No. 10 of 2017 which is currently in force and which has extended the size of the railway reserve in urban areas from 15 to 30 meters. I have found this question pertinent because PW1 and PW5's disclosure that Plots 8 Block L and Plot No. 8 Block K are only 20 or 24 meters away from the centre of the railway implicitly suggests that these two plots have now been partially or wholly rendered part of the railway reserve area. Section 24(1) of the Railway Act, 2017

strictly prohibits any human activities in the railway reserve area and specifically states that, no person shall graze, farm, erect a building, structure or execute any works on a railway reserve area (railway strip). In the foregoing, it is obvious that the third and fourth plaintiff can no longer retain ownership of their respective plots. Their continued occupation of the same will be offensive of law. Thus, it is prudent that their predicament be addressed with immediate effect.

Consequently, and further to the orders above, it is directed that a survey be conducted to ascertain the extent to which the railway reserve area stretches into Plots 8 Block L and Plot No. 8 Block K and upon the survey been conducted, a valuation be conducted by a Government Valuer and the compensation thereto be paid accordingly.

As the suit has partially succeeded and partially failed, the costs shall be shared by each party bearing its respective costs.

DATED and **DELIVERED** at **DODOMA** this 17th day of November 2023.

HIGH COURT TANZANIA

J.L. MASABO

JUDGE