

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

LAND CASE NO. 6 OF 2010

FRANK NYIKA (ADMINISTRATOR
OF THE ESTATE OF THE
LATE ASHERI NYIKA) } PLAINTIFF

VERSUS

LINUS CHENGULA RESPONDENT

13/10/2014 & 05/12/2014

JUDGMENT

P. F. KIHWELO, J.

The Plaintiff has filed a land case before this court against the defendant essentially for trespass in the suit premises to wit Plot No. 347 Block “E” Makambako Area. Initially the suit was filed by the Plaintiff in person but on 25/6/2013 the Plaintiff passed hence on 20/03/2014 a prayer to amend the Plaint in order to join the Administrator of the Estate of the deceased was made and the court granted the prayer hence Frank Nyika was included as the

Administrator of the Estate of the late Asheri Nyika, the Plaintiff. The Plaintiff prays, against the defendant for judgment and decree for the following reliefs:-

- (a) A declaration order that the defendant has trespassed into the Plaintiff's land.
- (b) Orders requiring the defendant to demolish the houses constructed and provide vacant possession.
- (c) General damages in the aggregate sum of TShs. 60,000,000.00 (say Tanzanian shillings Sixty Million) only as compensation for trespassing into the Plaintiff's land.
- (d) Cost of this suit; and
- (e) Any other order(s) and/or relief(s) this Honourable Court may deem just and equitable to grant.

When this matter came for the first day of the trial the court framed and recorded five issues for determination namely;

- (1) Whether the Plaintiff is the lawful owner of Plot No. 347 Block "E" Makambako Area.
- (2) Whether the defendant trespassed into the Plaintiff's suit land to wit Plot No. 347 Block "E" Makambako Area.
- (3) Whether the disputed plot was surveyed or not.
- (4) Whether Plot No. 347 Block "E" Makambako Area is part of unsurveyed Plot No.MWT/ 137 Makambako Area and;

(5) To what reliefs are the parties entitled to.

The Plaintiff was represented by Ms. Caroline Kivuyo, learned Advocate while the defendant was represented by Mr. Edward Kenyunko, learned Advocate.

When the trial began the Plaintiff marshalled two witnesses while the defendant lined up two witnesses as well.

PW1 (Frank Asheri Nyika) testified that he is the son of the late Asheri Nyika (the Plaintiff) and therefore the Administrator of the Estate of his late father. PW1 testified further that the Plaintiff acquired the suit premise from the local land authorities way back in 1981 and prior to that the Plaintiff was living in the same plot of land. PW1 stated that his late father was allocated that plot by the local land authorities since 20th January, 1981 and as a testimony he tendered before this court a letter of allocation Exhibit "P1". According to PW1 the land authorities allocated the said piece of land and directed the Plaintiff to pay the necessary fees.

PW1 went on to testify that as the Plaintiff and the defendant were neighbors and were occupying the same plot of land when the land authorities were doing the survey in 1980 they advised that

the two should sit together and agree as a result, the two sat and after agreement they wrote letters to the District Land Allocation Committee expressing their consensus to have the said plot surveyed and allocated to the Plaintiff. PW1 sought to tender the said letter as Exhibits unfortunately the same were secondary evidence hence inadmissible but upon a prayer being made they were only accepted for mere identification purposes as "ID1."

PW1 further stated that the said plot after survey became Plot No. 347 Block "E" and was allocated to the Plaintiff as clearly demonstrated by Exhibit "P1" but the Plaintiff and the defendant agreed that the defendant could stay in the said plot as long as the Plaintiff is not yet in need of the entire plot and that the defendant should not build a permanent/new house except for the muddy house in which the defendant was living in by then.

PW1 went further to testify that in 2010 to the surprise of the Plaintiff the defendant started constructing a permanent house in the suit premise besides the muddy house the defendant was prior living in. PW1 went on to narrate that the new house has been built at the middle of the suit premise whereas the old muddy house is still located at the right hand side of the suit premise while on the left hand side there is one neighbor's house by the name of Michael

Mgimba. PW1 finally prayed to the court for the reliefs as stated above.

Upon cross examination by the counsel for the defendant Mr. Edward Kenyunko PW1 stated that he was appearing in the case as the Administrator of the Estate of the late Asheri Nyika the Plaintiff and that the Plaintiff and the defendant had reached at an understanding in relation to the use and allocation of the disputed plot and that the letters in "ID1" were not formal agreement.

On further cross examination PW1 stated that the defendant has built the new house within the Plaintiff's suit premise and he denied the allegations that the Plaintiff's house is within the road reserve nor was he aware of any notice from Tanroads to demolish the Plaintiff's house. PW1 also stated that they did not make any mistake by allowing the defendant to keep on staying in the suit plot from 1980 to 2010 as the defendant was well aware that at some point he will be required to vacate the suit premise when the plans to develop materializes and that it was high time the Plaintiff develops the plot.

On the other hand PW2 (Gerald Doglas Komba) a land surveyor from Makambako local government authorities testified that he knows Plot NO. 347 Block "E" as one of the 51 Plots of

surveyed land located at Block "E" Makambako. He testified that these 51 plots were surveyed way back in 20 years. According to records (Exhibit P1) the said plot belongs to the Plaintiff. PW2 stated that the said plot measures 40 meters long and 18 meters wide.

PW2 testified further that he knows the disputed plot as he visited shortly before coming to testify and gave an account of the description by explaining that in the front part there are shops, on the right there is carpentry workshop, in the middle there is a house and on the left between Plot No. 346 and 347 Block "E" there is a muddy house. He went on to state that part of the muddy house is in Plot 346 while part of it is in Plot 347. The new house has been built in the middle of the disputed plot .

According to PW2 if a person has a residential licence over a surveyed area that is not recognized by the local land authorities in the first place because the residential licence applies to squatter area and are issued for purposes of identifying the house number and the owner for property tax purposes and also to assist the owner in securing loan. Initially they were granted for three years only but since January 2013 they are granted for five years.

While further testifying on allocation procedures PW2 explained that in the event two individuals own a single plot of land the land surveyor will establish who among the two has a lions share of the plot but at the end of the day it is upon the two individuals to agree on who among them should be allocated.

It is upon such agreement that the land authorities will move on with the allocation arrangements.

According to PW2 there is no such plot in Makambako as Plot No. MWT/137 but that refers to a house number for unsurveyed house at Mwembetogwa for property tax purposes. That number does not indicate the actual place but rather the general area which is Mwembetogwa and he has not seen that number before coming to testify but Plot No. 347 Block "E" is found in a surveyed area.

Upon cross examination by Mr. Edward Kenyunko, learned counsel for the defendant, PW2 stated that the suit premise was surveyed way back when Makambako was still under Njombe District Council which is over 20 years now. That the two can not be issued simultanous because one is superior over the other. Whereas the residential licence relates to unsurveyed plot the plot number is issued to a surveyed area. On his own account PW2 stated that he has not seen the residential licence for the defendant

and he is not aware whether there were people living there before the survey.

PW2 further went on to respond to Mr. Kenyunko's questions that residential licence to own an unsurveyed area is recognized by law and is renewable after the initial term of five years. That the agreement on what should be allocated has to be in writing and in the respective file. In case the survey is done by the municipal in order to allocate someone then compensation must be given. However, the situation is not the same where two individuals agree to survey an area for allocation purposes.

On the part of the defence witnesses DW1 (Linus Chengula) had the following to say. He is the resident of Makambako since 1965 and that he has three houses and his immediate neighbours are Asheri Nyika in the East, John Mhanzi in the West, Boaz Kyando in the North and Michael Nyimba in the South and that in 2010 a dispute arose about ownership of the suit premise between DW1 and the Plaintiff.

DW1 stated that the Plaintiff sue DW1 for trespass to the suit premises. According to DW1 the suit premise and all the surrounding area are unsurveyed to date and that he was issued with a residential licence in relation to the suit premise and has

been paying property tax and land rent every year. The residential licence along with the relevant receipts for tax payments were tendered and admitted as Exhibit "D1" collectively. He reiterated that the residential licence was issued for the first time on 1st January, 2011 and is due to expire on 1st July, 2016, and that all the neighbours in the surrounding area have residential licence and not title deeds. The new house he started building in 1998 and finished in 2010.

DW1 further testified that he never wrote any letter to surrender the suit property to the Plaintiff or anyone else. He went on to state that he has a kid by the name of Grace who was born in 1974 and by 1980 she was merely 6 years old. According to DW1 the area which he built the new house originally had an old house which he demolished as it was dilapidated.

Upon cross examination by the counsel for the Plaintiff Ms. Caroline Kivuyo, DW1 stated that the new house he built is the one with number MWT/137 and that he knew nothing about Exhibit "ID1".

DW2 (Daudi Mwinuka) testified that he lives at Mwembetogwa in Makambako since 1972 and he knows Linus Chengula as his neighbor but he also knew the deceased Asheri Nyika. DW2 went on

to testify that he knows very well the area DW1 lives as it is hardly 20 steps from where he lives and that DW1 has two houses and prior to building the new house he demolished the old one in order to build a modern house. He stressed that the demarcation between the plaintiff and DW1 area is very close about 2 metres only. DW2 stated that whereas the Plaintiff has been at Mwembetogwa since 1980 DW1 has been there since 1965 and there has not been any conflict until recently when the Plaintiff's house has been marked with an "X" by TANROADS. DW2 finalised his testimony by stating that the area where they live all the houses have been marked with numbers and that his is house No. 5 and that if the area is surveyed then there would be a survey map to indicate that but they only have numbers to indicate that they own the premises.

Upon cross examination by Ms. Caroline Kivuyo the learned counsel for the Plaintiff, DW2 stated that he moved to Makambako in 1972 and found DW1 living there but the Plaintiff moved to Makambako in 1980 and prior to that he was living in Saja. DW2 went on to testify that in 1965 he was living in another street not Mwembetogwa and that he can't recall exactly when was the new house built.

Following the closure of both the plaintiff's and the defence case both counsels requested to file their written final submissions

the request which was granted by the Honourable court and dully complied by the parties.

Briefly Ms. Kivuyo, the learned counsel for the Plaintiff in her spirited argument she stated in respect of the first issue that according to records particularly the testimony of PW1 sometimes in 1980 Makambako – Mwembetogwa area was surveyed and subsequently the Plaintiff was allocated the disputed Plot of land vide Exhibit “P1” and this fact is also confirmed by PW2 the land surveyor from Makambako Urban Authority. According to the testimony of DW1 and DW2 they also confirmed that the Plaintiff owns the suit premise but the only thing which they disputed was the demarcation.

As regards to the second issue the learned counsel for the Plaintiff submitted that parties agreed that the plot will be allocated to the Plaintiff and that the defendant would stay as long as the Plaintiff does not wish to use the entire premises and that the defendant will only demolish the house upon the Plaintiff’s wish to use the piece of land but to the contrary the defendant built a permanent house in the Plaintiff’s premises. She therefore forcefully argued that the defendant is a trespasser.

Arguing for the third issue Ms. Kivuyo's contention was that according to the testimony of PW2 Makambako in particular Mwembetogwa area was surveyed way back in 1980. Based on Exhibit "P1" the counsel for the Plaintiff strongly submitted that the disputed land was surveyed.

On the issue of whether Plot No. 347 Block "E" Makambako is part of the unsurveyed Plot No. MWT/137 Makambako Area, the counsel for the Plaintiff submitted that it is not a disputed fact that the defendant built a new house No. MWT/137 within the disputed plot this was the evidence of PW1 who testified that he saw house No. MWT/137 built in the middle of Plot No. 347 Block "E" and because the later plot is surveyed then the counsel for the Plaintiff was of the view that the defendant has trespassed the suit premise.

Finally the counsel for the Plaintiff prayed for the orders as previously explained at the beginning of this judgment. Mr. Edward Kenyunko, learned Advocate for the defendant on his part submitting for the first issue entirely faulted the testimony of PW2 on two main reasons namely PW2 did not have any identity to prove that he was actually who he claimed to be and represented Town Council and that PW2 lacked credibility. He further challenged Exhibit "P1" for not being in compliance with Section 27(2) of the Land Act Cap 113 RE 2002 or even the repealed Land Ordinance

Cap 113 Section 9(2) which stipulates that the Certificate of Right of Occupancy shall be deemed to be dully and validly executed if signed by the Commissioner for lands and sealed with his official seal.

Mr. Kenyunko forcefully argued further that PW1 did not manage to substantiate the ownership of the disputed plot by the Plaintiff because PW1 has failed to indicate what caused his delay to acquire the certificate of Right of Occupancy from 1981 the time he got the letter of allocation to date. Mr. Kenyunko further challenged the purported agreement between the Plaintiff and the defendant to surrender the disputed land to the Plaintiff. He contended further that the purported agreement was void for lack of consideration. In particular he categorically stated that the averment that the Plaintiff allowed the defendant to keep using the suit premises for 33 years does not make any sense to any reasonable person and went ahead to state that the Plaintiff has himself to blame for allowing someone to use his land for more than 30 years.

As regards the second issue Mr. Kenyunko hastily stated that as the Plaintiff had failed to prove ownership of the suit land then the defendant cannot be said to have

trespassed into the Plaintiff land. Mr. Kenyunko also argued that the Plaintiff did not prove the issue of survey of the disputed plot as Exhibit "P1" whose authenticity is in question can not alone prove that the disputed land is surveyed. He therefore prayed that the third issue too should be determined in the negative.

Finally Mr. Kenyunko in his spirited argument submitted that the Plaintiff has not proved in the balance of probabilities that there is Plot No. 347 Block "E" Makambako. He went on to submit that once an area is surveyed the boundaries of the plots allocated for every person must be certain and that the evidence of PW2 should not be acted upon since he merely relied on assumptions and not measurement. Hence Mr. Kenyunko submitted that the Plaintiff has not proved the case on the balance of probabilities and therefore the suit should be dismissed.

Having summarized the evidence of the witnesses and the final submissions by both counsels it is now my turn to determine the issues before me.

Starting with the first issue on whether the Plaintiff is the lawful owner of Plot No. 347 Block “E” Makambako. The testimony of PW1 who tendered Exhibit “P1” the allocation letter proves that the Plaintiff was allocated Plot No. 347 Block “E” on 20th January, 1981. Exhibit “P1” which is a letter of allocation reference number NJF/1967/4/11JN the Land Department within Njombe District Council notified the Plaintiff that his request for the allocation of the Plot of land has been accepted by the Land Allocation Committee and that he has been allocated the said Plot No. 347 Block “E” Makambako. As rightly pointed out by Ms. Kivuyo this was confirmed by DW2 the Land Surveyor and DW1 and DW2.

I did not with due respect find Mr. Kenyunko’s arguments meritorious and useful. I don’t find logical to fault the testimony of PW2 simply because he had no identity card or a letter showing that he was in fact representing the Town Council. With due respect I find this not to be practical and in the contrary I think that if the defendant wished to prove the Plaintiff wrong would have summoned an officer from the local land authorities to come and testify against Exhibit “P1” which was filed and served upon the defendant since 2010 but the defendant did not opt to do so. Further Mr. Kenyunko submitted that PW2 lacked credibility which a public officer deserves to possess. However, Mr. Kenyunko did not further explain or elaborate those attributes of a credible public

officer which PW2 did not possess as such I think the impression by Mr. Kenyunko was erroneous from both scores. Similarly it was a misconception to say that the letter of allocation was not in line with Section 27(2) of Cap 113 RE 2002 because the letter of allocation was issued in 1981 while the cited law was enacted in 1999 or that it did not comply with Section 9(2) of the repealed Land Ordinance because Section 9(2) relates to right of occupancy and not letter of allocation. I am therefore satisfied that from the evidence on record and the testimony presented before the court there is no doubt that the Plaintiff is the lawful owner of the disputed plot of land. It is a long established principle of law that squatters, in the eyes of the law, can not equate themselves to any person holding a title – (**Mwalimu Omari and Another V Omari A. Bilali** [1990] TLR 9). The first issue then is answered in the affirmative.

Coming to the second issue on whether the defendant trespassed into the Plaintiff's suit land Plot No. 347 Block "E" Makambako Area. By definition trespass to land like the one in the present suit is any unjustifiable intrusion by one person upon the land in possession of another. It has therefore been stated with a light touch:

“If the defendant place a part of his foot on the Plaintiff’s land unlawfully, it is in law as much as trespass as if he had walked half a mile on it”.

This is as per **Ellis V Loftus Iron & Company** (1874) L.R 10 Cap 10 cited with approval by Lugakingira J. (as he then was) in **Frank Mchuma V Shaibu A. Shemndolwa** [1988] TLR 280.

The counsel for the Plaintiff in her submission argued that by consent the parties agreed to have the plot allocated to the Plaintiff alone and after the allocation they agreed that the defendant should continue living in the premises until when the Plaintiff want to use his piece of land. I would like to make two quick observations. One it must be said that the only evidence to prove the agreement between the parties is “ID1” which were secondary as such could not be admitted as an Exhibit in the circumstances hence the Plaintiff can not be heard to rely on it. Two assuming for argument that this agreement or arrangement was there then by any stretch of imagination the defendant has for all intends and purposes remained in the suit premise lawfully the only issue is whether he was entitled to construct the new house or not and in any case the Plaintiff has not expressed the wish to use the premises but what prompted the Plaintiff is the conduct of the Plaintiff to construct the new house.

I am inclined to agree in part with Mr. Kanyunko learned counsel for the defendant that the Plaintiff has to blame himself for allowing someone to use his land for more than 30 years. In my view this issue is answered in the negative.

Turning now to the third issue on whether the disputed plot was surveyed or not. It is on record that the Plaintiff was issued with the letter of allocation on 20th January, 1981 and that the Plot which was allocated was Plot No. 347 Block "E" Makambako and that the allocation of the said plot preceded a survey exercise. This was confirmed by PW2 the land surveyor who testified that the disputed plot was among the 51 plots which were surveyed way back in 1980. Once again I did not, with due respect, find the submission by Mr. Kanyunko very useful as he reiterated that the letter of offer can not prove that survey was conducted. In my view this issue is answered in the affirmative.

On the issue of whether Plot No. 347 Block "E" Makambako Area is part of the unsurveyed Plot No. MWT/137 Makambako Area, it was proved by PW1 and PW2 that the defendant has built in the middle of Plot No. 347 Block "E". During his testimony PW2 stated that;

*“I saw shops in the front of the plot while on the right there is carpentry workshop, in the middle of the plot there is a house and on the left between Plot No. 346 and 347 Block “E” there is a muddy house. Part of that house is in Plot NO. 346 while part of it is in Plot No. 347. **The new house has been built in the middle of Plot No. 347 Block “E” which is the property of Asheri Nyika according to Exhibit P1**”(emphasis supplied).*

It is apparently clear from the evidence on record that the suit house No. MWT/137 is built within Plot No. 137 Block E, Makambako hence in my considered opinion this issue is also answered in the affirmative.

In view of what I have demonstrate above I order as follows:-

- (a) The defendant is hereby required to demolish the house constructed in Plot No. 347 Block E, Mwembetogwa, Makambako and provide vacant possession.
- (b) Costs are to follow the event.

P. F. KIHWELO

JUDGE

17/03/2015

Right of appeal is fully explained.

P. F. KIHWELO

JUDGE

17/03/2015

Judgment pronounced in the presence of Ms. Caroline Kivuyo, learned Advocate for the Plaintiff and Mr. Edward Kenyunko, learned Advocate for the Defendant.

P.F. KIHWELO

JUDGE

17/03/2015