

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DODOMA

LAND CASE NO. 1 OF 2010

KILALA OMARY ABDALLAH, PLAINTIFF

VERSUS

THE CHIEF COMMANDER TANZANIA

PEOPLE'S DEFENCE FORCES & 2 OTHERS DEFENDANTS

Date of last order: 7/12/2015

Date of Judgment: 14/12/2015

JUDGMENT

Sehel, J.

This is a suit for declaratory orders that Plot No. 1 Ihumwa Service Centre (disputed Plot) be declared the property of the Plaintiff, one Kilala Omary Abdallah. The Plaintiff also prayed for an order directing the defendants to remove the placard placed at the disputed plot; general damages and costs of the suit.

The defendants filed their joint Written Statement of Defence alleging that the disputed plot is within the land held under Tanzania People's Defence Forces as such the placard was placed by the 1st Defendant.

After several adjournments on the pretext that the suit is under mediation the suit was set for hearing and the following issues were framed and recorded for determination:-

1. Whether Plot No.1 Ihumwa Service Center comprised of title No. 7930 DLR is within the Chief of Defence Force's Area.
2. Whether Capital Development Authority informed the 1st Defendant that the land in dispute belongs to the Plaintiff.
3. Whether the notice erected by the 1st Defendant in the suit land caused the plaintiff to fail to enter and develop the said plot.
4. Whether failure of the 1st Defendant to remove the notice in the plot caused commercial loss to the plaintiff.
5. To what relief are parties entitled..

To prove his case, the plaintiff called two witnesses including himself. The first witness is Kilala Omary Abdallah (PW1) who told this court that he bought the disputed plot from Haider Mulafter Hussein Gulamali in 2007 at a consideration of Tshs 8,600,000/=. He tendered to that effect

1. A letter with Ref. No. LR/DOM/T/7930DLR/30 dated 15th June, 2007 and a Deed of Transfer dated 30th May, 2007 which were collectively admitted as "Exh. P1". These documents show that a transfer was effected in respect of Title number 7930 DLR from Haider Mulafter Hussein Gulamali to Kilala Omary Abdallah.
2. Ground Lease Agreement No. 2404, L.O. 96253/2404 for Plot No. 1 Ihumwa Service Centre as Exh. P2.

PW1 further told this court that he started to renovate the area by putting underground petrol tanks, four tanks but when he started to place petrol pumps, army officers came and stopped him from further dealing with the plot. He went to see the commander in chief of 911 KJ, Col Mshamba who affirmed to him that he should stop and

the issue is being dealt with at Dar es Salaam, Head Quarters. It was his testimony that the army then placed a placard reading:-

" Huruhusiwi kufanya shughuli yeyote katika eneo hili"

The plaintiff said he then went to Capital Development Authority (CDA) to ask for clarification. CDA met with 911 KJ army officers who clarified to them that the plot is not within the army compound. He also tendered a letter with Ref. No. CDA/DP/bc-15/21754 dated 13th June, 2008 as Exh. P3. The Exh. P3 states that Plot No. 1 Ihumwa is outside the army compound and that according to CDA records, the area was surveyed in 1985 vide plan No. E¹³ 206/2 NO. 20741. The letter further clarifies that the Plot was surveyed in 1992 through plan No. D¹⁴ 280/2 with Registration No. 45755 and that the boundary of the army area begins at 100 meters from the main road.

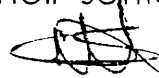
The plaintiff testified that despite all the efforts he made, the army refused to allow him to utilize the disputed plot. He therefore decided to institute a suit against the defendants.

The second witness is Edward John Mpanda (PW2) a town planner working with Capital Development Authority testified that the

plot No. 1 Ihumwa Service Centre was surveyed as a plot for service station. According to their office files, the plot is now in the name of Kilala Omary Abdallah and it is outside 911KJ area. He, therefore, asserted that the army was notified and they have no right over the disputed plot. That was the Plaintiff's case.

The defendant's case was fixed to commence on 1st July, 2015 but defendants failed to bring their witness. They prayed for another hearing date. The case was fixed on 13th July, 2015 but still they failed to bring their witnesses hence it was fixed on 3rd August, 2015. On 3rd August, 2015 parties appeared before Deputy Registrar and by consent of the defendants, the hearing was fixed on 13th August, 2015.

On 13th August, 2015 defendants came with an excuse that parties are under negotiations hence requested for a month's time adjournment so the case was fixed for mention on 15th September, 2015 with a hope that settlement agreement will be reached. On 15th September, 2015 no agreement was reached so I decided to fix a hearing a date in order for the case to proceed with the hearing and if settlement is reached then they can come with their settlement



agreement to record it. The case was fixed for hearing on 19th October, 2015.

On 19th October, 2015 Ms. Magesa appeared and notified the court that she has three witnesses but prayed for short adjournment. I granted short adjournment and the case was fixed to start at 1400hrs. At 1400hrs, the hearing of the defence case started.

Khalid Iddi Hernedi (DW1) an army officer from Ihumwa – TPDF testified that he moved to Ihumwa in 1995 and that from 1995 he knew that the disputed area belong to the army. He said the first owner was one Hussein Gulamali who started the construction of office building for petrol station but later on he was stopped by the army. It was his testimony that thereafter came the plaintiff who wanted to proceed with the construction by putting Petro tanks but he was stopped by the army. This witness also told this court that they were stopped to proceed with the construction because of security reasons. He said in military camps there are bombs, firearms, bullets and even military trainings are conducted therein, and hence it is not safe to have a petrol station nearby. He said at the disputed plot, the office building

was built and completed, and there are pump machines but tanks are not yet installed.

The second witness was Leonard Albert Madaha (DW2). This witness did not complete his examination-in-chief. He partly testified and then the learned state attorney requested for further adjournment as she did not have enough time to discuss the case with her witnesses because in the morning she had a criminal session which she had to attend to before appearing before me.

In brief DW2 is also an army officer stationed at Ihumwa TPDF since 1989. He told this court that what he knows about this case is for the plaintiff to be compensated and that the matter is handled at Headquarters' Dar es Salaam.

It was from this testimony that prompted the learned State Attorney to request for a further short adjournment which prayer I granted and made an order that the hearing is adjourned till next day i.e 20th October, 2015 but it is the last adjournment.

On 20th October, 2015, the learned state Attorney requested for a further adjournment with the reason that she had time to consult

with her seniors and was told that the case is under negotiations for the purposes of settling the matter out of court. Counsel Nyabiri, also affirmed to this court that it is true they are under negotiations and negotiations have reached to an advanced stage. They prayed for a month time adjournment. Being comforted that the negotiations have reached to an advanced I granted final last adjournment to 7th December, 2015.

On 7th December, 2015, Mr. Sarara, learned state attorney appeared, with total disregard and taking no notice of the last court's order, requested for adjournment with a reason that their intended witness one Ssgt. Elias is engaged with other official duties hence he could not be able to turn up for today's hearing. In terms of Order XVII Rule 3 of the Civil Procedure Act, Cap 33 I decided to close the defendant's case with a view to proceed with deciding the suit.

Having summarized the evidence brought before the court and going through the sequence of this suit, let me now deal with the issues framed. I would, according to the nature of the suit and the evidence in the records, wish to combine issues number one, two and three

together. According to pleadings and evidence, it is the plaintiff's assertion that Plot No. 1 Ihumwa Service Centre is his property and does not fall within the army area. PW1 told this court that he bought the disputed Plot, in 2007 from Haider Muzaffer Hussein Gulamali at a price of Tshs. 8,600,000/=. He tendered and admitted before this court Transfer Deed (Exh.P1) and Ground Lease Agreement (Exh, P2) which both proved that the plaintiff is the legal owner of the disputed plot. Further PW2 proved before this court that the records in the Capital Development Authority show that the current owner of the disputed plot is the plaintiff. Section 119 of Tanzania Evidence Act, Cap. 6 provides:-

"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 asserts that he is not the owner "

In this suit, it was shown and proved by the plaintiff that he is the lawful owner of the disputed plot through the evidences of PW1, PW2 and even DW1 when he said thereafter came the plaintiff who

wanted to proceed with the construction. It is, therefore. Upon the defendants to prove otherwise. The defendants apart from DW1's and DW'2 assertions that they know the disputed land belong to the army, failed to produce or bring any document that proves, contradict, or show a status different from those contained in Exh. P1 and P2.

I also had time to examine Exh. P2. Exh. P2 has an insert of a sketch map that shows the disputed plot is outside the JWTZ site. This fact was also further clarified by PW2 who asserted that the beacons of the disputed plot are not within the army area. The army area is about 100 meters away from the main road. Further Exh. P3 clearly describes how the disputed Plot came into being and that it is outside the army area. All these information according to PW1, PW2 and Exh.P3 were availed and notified to 1st defendant but 1st defendant continued to insist that the disputed plot is within their area. It was further established by both PW1 and DW1 that the Plaintiff was stopped from further developing the disputed plot. The plaintiff, therefore, failed to make any further development especially when

there was a placard placed at the disputed plot prohibiting person from further dealing with it.

With these crystal clear evidences, I hold that plot No. 1 Ihumwa service comprised of title No. 7930 DLR is not within the Chief of Defence Force Area, that Capital Development Authority informed the 1st Defendant that the land in disputed belongs to the plaintiff and that the notice erected by the 1st defendant caused the plaintiff to fail to enter and develop the said plot.

Turning to the fourth issue that deals with commercial loss for non-use of the disputed plot, the Court of Appeal of Tanzania in the case of **Kiploo Vs. Attorney General [2019] EA 200** at pg. 208 held that:

"loss of use is a claim in special damages and ought to be pleaded and strictly proved."

The plaintiff though at paragraph 10 of his plaint pleaded that failure by the 1st defendant to remove the notice, occasioned commercial loss to him for non-use of the said plot for construction of his intended business, failed to prove the same. Apart from the Plaintiffs own assertion that he secured a loan from CRDB which he

still pays it and that during cross examination he said he once bought 18,000 liters which he was compelled to siphon it all and was unable to sale it, there is no other evidence to support/back up the assertions. No evidence was brought to show that he has a licence to run a petrol station, no schedule of expected daily sales were tendered before this court, the loan agreement was not brought before this court to show that he borrowed the money from the bank and no receipts were produced to show that he bought 18,000 liters of petrol/diesel. Since there is no proof then I can perfectly hold that no commercial loss for non-use was suffered by the plaintiff. Issue number four is answered in the negative.

Lastly is the relief. The Plaintiff enumerated in his pleading the relief that he wants this Court to grant. I will deal with each relief claimed. First an order that the Plot in issue is the property of the Plaintiff. Since I have found that Plaintiff is the legal owner of the disputed plot then the order that the Plaintiff is the lawful owner of Plot No. 1 Ihumwa Service Centre comprised of Title No. 7930 is hereby granted as prayed

Second he prayed for an order directing the defendants to remove the offending notice from the plot in issue to allow the Plaintiff to enter therein and develop the same. Since it is not disputed that the 1st defendant placed the notice and since the Plaintiff is declared the lawful owner then the prayer is granted as prayed.

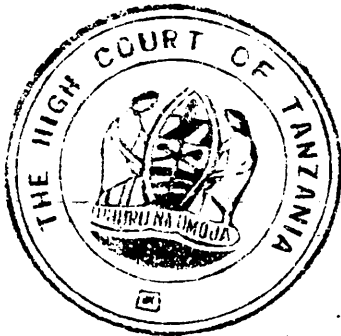
Third is the prayer for payment of general damages to be assessed by the Court. Unfortunately the pleadings do not establish the kind or type of loss suffered by the Plaintiff. The pleadings only show that there are specific damages which unfortunately were not proved by the Plaintiff as such this Court cannot grant a prayer that was not pleaded. The prayer is declined.

In summary judgment and decree is entered against the defendants jointly and severally as follows:-

1. That, Plot No. 1 Ihumwa service Center is hereby declared as the property of the plaintiff one Kilala Omary Abdallah;
2. The defendants are directed to remove a notice from the disputed plot to allow the plaintiff to enter and develop the same; and

3. Plaintiff is to have his costs.

It is so ordered.



A handwritten signature in black ink, appearing to read "B.M.A. Sehel", written over a horizontal line.

B.M.A. Sehel

JUDGE

14th December, 2015