

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 112 OF 2019

ALLY ABDALAAH SALEH.....PLAINTIFF

VERSUS

JUMA LYIMO..... DEFENDANT

JUDGMENT

24/05/21 & 19/08/2021

Masoud, J.

This judgment concerns a claim by the plaintiff whose cause of action against the defendant is about invasion and trespass by the defendant into the plaintiff's land (hereinafter the suit plots), excavation of sand from the invaded and trespassed suit plots, removal of survey beacons, and causing massive destructions and deforestation on the suit plots. The suit plots were described in the plaint as Plots Nos. 1,2,3,4,5, and 6 Misugusugu, Kibaha, Light Industry and Housing Commercial Area, Coast Region.

It was in the plaint alleged by the plaintiff that the excavation which was carried out by the defendant on the suit plots was unlawful as the

defendant did not have a permit from relevant government authorities. In a bid to prevent the destruction and following the alleged complaint by the plaintiff, the National Environmental Management Council issued a notice to the defendant requiring him to stop the destruction of the suit plots caused by his excavation of sand on the plots.

The plaintiff also, allegedly, complained in writing to the District Commissioner of Kibaha about the dispute involving the unlawful sand excavation by the defendant on the suit plots. Despite the intervention by the District Commissioner, the defendant did not stop such unlawful acts on the suit land. As a result, the plaintiff has suffered damages due to the unlawful acts of the defendant. As the plaintiff is an aged person, he appointed one, Halima Hassan (PW.1), as his lawful attorney, to prosecute the matter on his behalf.

Because of the allegations, the plaintiff prayed for judgment and decree as follow. Firstly, a declaration that the plaintiff is the lawful owner of the suit plots. Secondly, an order that the defendant pay the plaintiff the sum of TZS 250,000,000/- for the loss caused by the defendant malicious acts of deforestation, destroying the ecology, and infrastructures, and illegal excavation of sand in the suit premise.

Thirdly, an order that the defendant should pay interest on the afore said amount in (b) at the commercial rate of 12% from the date of judgment until final payment. Fourthly, an order for the defendant to pay the plaintiff general damages as assessed by the court. Fifthly, costs of the suit. And lastly, any other relief(s) as the court may deem fit to grant.

In his reply in the written statement of defence, the defendant disputed to have invaded and trespassed into the suit plots which according to him the plaintiff alleges to own. The relevant paragraph in the written statement of defence of the defendant reads in part and I quote:

5. That in relation to paragraph 4 of the plaint, the defendant states that the defendant has neither trespassed nor excavated sand in the purported plots as the plaintiff alleges to be a lawful owner of said plots Nos 1, 2, 3, 4, 5, and 6 Block U, Misugusugu.....

The defendant disputed to have excavated sand in the suit plots and to have been notified by NEMC to stop the excavation of sand in the suit plots. He disputed the claim for specific damage amounting to

350,000,000/- as there is not even particulars given for damage suffered.

The defendant also alleged in his written statement of defence that he is a shareholder of EL Land Auto Repairs Co. Ltd which lawfully owns a Farm No. 700, Misugusugu measuring 29.934 hectares, and having a certificate of title No. 41513. He further stated that he has a mining licence in respect of the said farm which was issued in his favour by the relevant authority. He disputed powers of the District Commissioner of Kibaha to deal with matters relating to land and mining. He urged the court to dismiss the suit with costs.

The issues for court determination which were recorded by my Sister Hon. Opiyo, J. on 29/6/2020 were as follow. Firstly, whether the plaintiff is the lawful owner of the suit premise. Secondly, whether the suit premise has any relation with Farm No. 700, Misugusugu, Kibaha. Thirdly, whether the defendant trespassed and excavated sand causing massive destruction to suit premise to the tune of TZS 250,000,000/-. And lastly, to what reliefs are parties entitled.

The hearing of the suit was conducted by filing of affidavits for evidence in chief of witnesses before the witnesses were cross-examined and re-examined on their respective affidavit. The plaintiff was represented by Mr Allan Kabitina, and Mr E. Rweyemamu, Advocates, while the defendant was advocated by Mr Cleophas Manyangu, Advocate.

Whereas the plaintiff had a total of four witnesses, the defendant marshalled three witnesses. The cross-examination and re-examination that followed were informed by the affidavits of the witnesses on the record. Before cross-examinations, the witnesses, as was relevant, had opportunity to tender in evidence exhibits.

I have read all the affidavits containing the evidence in chief of the witnesses, and the testimonies of such witnesses, which resulted from the cross-examinations and re-examinations. The majority of the evidence had a bearing on the above issues. However, the question that I must resolve is whether the adduced evidence answers the issues in the favour of the plaintiff's case. In resolving the question guidance was sought from the principle obtaining from section 110(1) of the Evidence Act, cap. 6 R.E 2019. The principle has it that he who desires the court

to give judgment as to any legal rights or liability on the existence of facts which he asserts must prove that such facts exist.

As I reflected on this question as to how the evidence answers the issues, I was mindful that the suit at hand related to a claim of ownership of the suit plots by the plaintiff, trespass by the defendant on the suit plots which took place sometime in August 2015, excavation of sand from the suit plots by the defendant, massive destruction of the suit plots resulting from the unlawful excavation of sand from the plots and entailing removing survey beacons, deforestation and destruction of infrastructures. I was mindful also that there were not pleadings as to specific damages allegedly suffered by the plaintiff.

I keenly noted that the evidence can best be assembled in groups relating to what the suit is all about for ease of understanding. The first group consists of pieces of evidence mainly emerging from PW.1, DW.2 and DW.3. These pieces of evidence are in relation to how the suit plots were acquired from their previous owners, surveyed and registered as such under the ownership of the plaintiff. The testimonies of PW.4, and DW.1 supported ownership of the plaintiff of the suit plots as was the testimony of DW.2 and DW.3. It is noteworthy that the evidence as to

ownership of the plaintiff of the suit plots is also supported by certificates of title deed for the said plots which was tendered by PW.1 and admitted in evidence by this court as exhibits.

The other evidence, which related to the above, was in relation to Farm No. 700, Misugusugu. Indeed, all the above witnesses whose testimonies had bearing on the ownership of the suit plots associated the ownership of Farm No. 700 with the defendant as a separate and distinct piece of land from the suit plots Nos 1-6, Block U, Misugusugu. It is the evidence of DW.1 and DW.2 which categorically stated that the said Farm belongs to EL Land Auto Repair Co. Ltd in which the defendant is a shareholder. A certificate of title No. 41513 for the said Farm was admitted as an exhibit having been tendered by DW.1.

Apart from DW.1, there was also DW.2 and DW.3 whose evidence showed how the said Farm No. 700 was acquired by the defendant from various previous owners and hence separate from the suit plots. Notably, the testimony of DW.2 was the evidence of a person residing at Misugusugu who served as a witness when the plaintiff and the defendant purchased their respective lands; while that of DW.3 was of one who not only a resident of Misugusugu but also one who sold his

piece of land comprising the suit plots to the plaintiff and another part of his land to the defendant.

To be sure, some of the previous owners, such as DW.3, were according to DW.2 the same persons who sold parts of their previous pieces of land to not only the plaintiff but also defendant. What is crucially critical in the evidence of DW.2 is that the land belonging to the defendant which included Plots 19-51, was quite separate from, and far away from the suit plots. Evidently, the testimony of DW.3 is clear that he sold his pieces of land not only to the plaintiff but also the defendant. Indeed, PW.1 admitted that DW.3 was amongst those who sold their pieces of land to the plaintiff, and that those who sold their pieces of land to the plaintiff are the ones who could give cogent evidence on about the suit plots.

The other group of evidence comprised pieces of evidence that related to trespass by the defendant into the suit plots, excavation of sand from the suit plots by the defendant. This was the overwhelming evidence apparent not only in the testimony of the prosecution witnesses, but also the testimony of the defence witnesses. It is common ground in the evidence that the area within which the suit plots are situated is

seriously affected by excavation of sand that had been taking place in the area. Amongst such witnesses, there are those, particularly the defence witnesses, who maintained that the area had been so affected even before the plaintiff purchased what now comprised the suit plots. This evidence denied involvement of the defendant in excavating sand from the plaintiff's suit plots.

While PW.1 and PW.4 attributed the effect of the excavation of sand on the suit plots to the defendant, his employees and agents; the defendant (DW.1) denied any involvement in such undertaking. The evidence of DW.1 is in this respect supported by the evidence of DW.2 and DW.3 who testified to the effect that the suit plots had been excavated by a company which built the high way between Kibaha and Mlandizi in 1990s long before the suit plots were acquired by the plaintiff. As earlier noted, the evidence of DW.2 and DW.3 is credible in terms of their involvement as witness and vendor when the plaintiff acquired by sale the suit plots.

Equally important to bear in mind is that the testimony of PW.1, PW.2, and PW.3 was evident that the witnesses had never actually seen the defendant excavating sand from the suit plots. They could not also testify specifically on the items of the alleged destruction, namely,

infrastructures, and removed beacons. There was only a flat claim of PW.4 to the effect that he has several times seen the defendant allowing people and trucks to excavate and collect sand from the suit plots. No specific dates were given nor particulars of the vehicles and peoples involved.

I think the evidence of DW.2 and DW.3 in relation to the excavation of sand in the suit plots must be considered in the light of the evidence of the prosecution witnesses and in particular, PW.2 and PW.3 on a number of aspects that dents their (i.e PW.2, PW.3 and PW.4) credibility of the latter. One, the evidence of the latter was not from witnesses who either participated in the sale transaction leading to the plaintiff's ownership of the suit plots. Rather, it was the evidence of those who saw the effect of excavation of the sand after the complaint was allegedly lodged to the relevant authorities by the plaintiff. Three, the evidence of the latter was the evidence of those who do not reside within the locality of the suit plots.

As to the evidence of PW.1, it was from the testimony of an attorney of the plaintiff, purporting to reside at Misugusugu, Kibaha, while in cross-examination she told the court that she resides at Temeke kwa Azizi Ally,

Dar es Salaam. Her evidence was not clear as to why those who sold part of the land presently belonging to the plaintiff were not called to testify. Of significance, her evidence in chief did not disclose the source of information as she was not the owner of the suit plots or employees of the plaintiff.

The evidence of PW.4 is equally characterized by the failure of such witness to properly identify the neighbours surrounding the suit plots. It is also characterized by the failure to state when exactly he saw the defendant receiving money collected from people he allowed to excavate sand from the suit plots, and how he knew that they were allowed by the defendant to excavate sand from the plots. The evidence of PW.4 is further characterized by the failure also to identify vehicles that were collecting sand from the suit plots having so been allowed by the defendant.

There was further evidence as to alleged complaint about trespass and sand excavation by the defendant which was reported by the plaintiff to relevant authorities. This evidence is apparent in the mere testimony of PW.1, PW.2, PW.3 and PW.4 which is not supported by anything else. Whilst the complaint implicated the defendant for trespass and

vandalizing the suit plots by sand excavation, there were no other evidence other than the mere assertion of PW.1, and PW.4 claiming that the defendant was the trespasser vandalizing the plots, and the evidence of several photographs admitted in evidence as exhibits. The very written complaint was not part of the evidence adduced in the court.

While PW.2 and PW.3 told the court that the suit plots were affected by sand excavation, they told the court that when they visited the suit plots other than seeing the effects of excavation, they never saw the defendant excavating sand from the plots. DW.1, who has been the Chairman of Misugusugu local government street since 2009, testified that there was no such complaint lodged before his office by the plaintiff.

Aspects of PW.1 and PW.4 which dent their credibility were covered herein above. Of interest, it is neither PW.1 nor PW.1 who saw the defendant excavating sand from the suit plots. As to the photographs that PW.1 tendered in evidence, they leave a lot to be desired in so far as they do not show, firstly, that they had anything linking the defendant with the alleged trespass and excavation, and secondly, that they were truly taken at the suit plots and if so sometime in August 2017. They were likewise not showing the massive destruction of infrastructures,

deforestation and the beacons allegedly removed by the excavation of sand by the plaintiff.

There is also an issue as to who took the photos. The testimony of PW.1 is contradictory. I have had regard to the averments in the affidavit of PW.1 suggesting that she was the one who took the photos and what she also told the court, as she was tendering the photos in evidence and during cross-examination, that the same were taken by unnamed environmental officers from NEMC who visited and inspected the plots and who were not brought to testify in respect of the photos and be cross-examined accordingly.

As I considered the first issue for determination in this suit in the light of the evidence I have analysed herein above, I recalled that the plaintiff alleged in his plaint that he was the owner of the suit plots described herein above and invited the court to declare him the rightful owner of the same. In his written statement of defence, the defendant had it that he neither trespassed nor excavated sand in the purported suit plots allegedly belonging to the plaintiff. Rather, he is the shareholder of EL Land Auto Repairs Co. Ltd which owns Farm No. 700, Misugusugu in

respect of which he obtained a mining licence to mine sand in small part of the said Farm.

In my determination of the first issue, I am satisfied that the evidence answers the first issue in the favour of the plaintiff. The title deeds admitted in evidence having been tendered by PW.1 clearly show that the said suit plots belong to the plaintiff; as is also evident in the evidence of DW.1, DW.2, and DW.3 which admitted that the plaintiff is indeed the owner of the suit plots. I therefore hasten to proceed to answer the above issue in the affirmative.

The submissions by Mr Cleophas Manyangu, the counsel for the defendant, that the suit be struck out because the pleadings did not raise an issue as to ownership of the suit plots were in my view unfounded. In my reasoning in this respect, I have had regard to paragraph 4 of the plaint on the claimed ownership by the plaintiff of the suit plots and paragraph 3 of the written statement of defence which, seemingly, questioned the plaintiff's claimed ownership and hence urged the court to dismiss the suit with costs.

The second issue for determination is whether the suit premise has any relation with Farm No. 700, Misugusugu, Kibaha. I am satisfied that the answer to the first issue on the ownership of the suit plots equally answered this issue. I say so because the evidence in its generality was clear that the two premises were separate and distinct from one another much as they are in the same locality and bordered one another. They are under separate ownership in that while the suit plots belong to the plaintiff, Farm No. 700 was shown to belong to EL Land Auto Repair Co. Ltd as per the title deed tendered by the defendant and admitted in evidence as exhibit. In my finding therefore the two premises have no relation to one another in the context of what I have shown herein above.

As to the issue whether the defendant trespassed and excavated sand causing massive destruction to suit premise to the tune of TZS 250,000,000/-, I hasten to find that there was no iota of evidence establishing the alleged loss of TZS 250,000,000/- due to the alleged massive destruction. Such evidence would nonetheless not hold even if it were adduced by the plaintiff because there were no specific pleadings for the specific damage pleaded in the plaint. My finding and holding with respect to the issue at stake are informed by the principle restated

in **Stanbic Tanzania Limited versus Abercrombie & Kent T. Limited**, Civil Appeal No. 21 of 2001 CAT (unreported) to the effect that special damages must be claimed specifically and proved strictly.

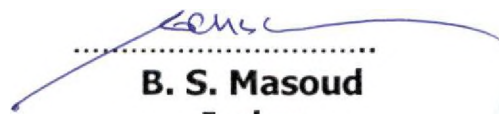
On the other hand, the very basis of the allegation of trespass and excavation by the defendant was not proved on the balance of probabilities, regard being had to the shortcomings of the evidence of PW.1, PW.2, PW.3 and PW.4 revealed herein above, which did not establish that the defendant had actually trespassed the suit plots and excavated sand therefrom some time in August 2015 as alleged. I have had regard also to the evidence of DW.2 and DW.3 which had it that the sand had been excavated from the suit plots before the plots were acquired by the plaintiff.

In respect of the findings herein above, I am satisfied that the plaintiff is not entitled to reliefs sought, save for a relief for a declaration as to his ownership of the suit plots, which ownership was not contested by the defendant during the trial. However, as to the other reliefs, I am satisfied that there is no evidence adduced supporting granting the same. In particular, I am not satisfied that the plaintiff has made a case for, an order that the defendant pay the plaintiff the sum of TZS

250,000,000/- for the loss caused by the defendant malicious acts of deforestation, destroying the ecology, and infrastructures, and illegal excavation of sand in the suit premise. I am likewise not satisfied that a case has been made by the plaintiff for an order that the defendant pay interest on the afore said amount at the commercial rate of 12% from the date of judgment until final payment. I am also not satisfied that a case has been made by the plaintiff for an order for the defendant to pay the plaintiff general damages.

In the end, the suit partly succeeds as to the prayer for a declaration that the plaintiff is the lawful owner of the suit plots, which is hereby granted, but it fails in respect of the rest of the other prayers listed herein above. Considering the circumstances of this case and the end results, each of the parties herein shall bear own costs. It is so ordered.

Dated at Dar es Salaam this 19th day of August 2021.


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B. S. Masoud
Judge

