

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO.22 OF 2018**

FRANCE MCHALANGE PLAINTIFF

VERSUS

1. TANZANIA NATIONAL ROAD AGENCY	} DEFENDANTS
2. MINISTRY OF WORKS, TRANSPORT AND COMMUNICATION		
3. THE ATTORNEY GENERAL		

JUDGMENT

Date of the last Order: 15.09.2021

Date of Judgment: 28.09.2021

A.Z. MGEYEKWA, J

This suit was lodged before this court by the Plaintiff herein FRANCE MCHALANGE against the Defendants herein TANZANIA NATIONAL ROAD AGENCY, MINISTRY OF WORKS, TRANSPORT AND COMMUNICATION AND

THE ATTORNEY GENERAL. The Plaintiff is claiming against the defendants jointly and or severally for declaratory orders that the demolition of the Plaintiff's House no KIM/ KMB/ 3901 at Kimara Temboni, by the defendants is illegal and for Payment of special damage of Tshs.241, 000,000/= being the value of the demolished house and general, punitive and exemplary damages to the tune of Tshs, 2,000,000,000/=.

The facts of the case can be deciphered from the pleadings and evidence on record go thus: the Plaintiff on 16th May, 1998 purchased a parcel of unsurveyed land at Kimara Temboni area in Kinondoni District within the City of Dar es Salaam at a consideration of Tshs. 1,500,000/= from Mr. Mustafa Kondo Viame and constructed a residential house with No.KIM/KMB/3901. The Plaintiff in his Complaint further stated that he was paying the Municipal levy and land tax to the Tanzania Revenue Authority. The Plaintiff further alleged that on 17th October, 2017, Defendant's officials issued the Plaintiff with a seven days' notice to demolish the Plaintiff's house alleging the same was constructed along the road reserve. The Plaintiff consulted a registered valuer M/S TRACE ASSOCIATES LTD to evaluate the said house before

demolition and came out with a value of Tshs. 241,000,000/= being the value of the said house.

The Plaintiff wrote a demand letter and intention to sue, the Defendants refused to rescind their demolition orders or compensate the Plaintiff before demolition. The Plaintiff claims that the demolition orders were illegal and subjected the Plaintiff and his family to unnecessary inconvenience and mental torture the Plaintiff, therefore, demands Tshs. 2,000,000,000/= being punitive, exemplary and general damages.

In their Plaint, the Plaintiff prays for Judgment and Decree against the defendant as follows:-

- (a) A declaration that the demolition of house No. KIM/KMB/3901 at Kimara Temboni by the Defendants was illegal.*
- (b) Payment of Tshs. 241,000,000/= being special damages.*
- (c) Payment of Tshs. 200,000,000/= being general, punitive, and exemplary damages.*
- (d) Interest on (a) above at the commercial rate of 30% per annum from 17th October, 2017 to the date of Judgment.*

- (e) Payment of the interest on the decretal sum at the court's rate of 12% per annum from the date of judgment to the date of payment.*
- (f) Costs.*
- (g) Any other and further orders as this Honourable Court deems just and equitable to grant.*

On the other hand, the Defendants, in response to the Plaintiff's claims, have filed a Written Statement of Defence.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brother; Hon. Maige, J and Hon. Hamza, Deputy Registrar who conducted the 1st Pre-Trial Conference and Mediation respectively. I thank my predecessors for keeping the records well and on track. I thus heard the testimonies of the witnesses for the parties and now have to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

At all the material time, the Plaintiff was represented by Mr. Jamhuri Johnson, learned Advocate, while the Defendants was represented by Ms.

Happiness Nyabunya, learned Principal State Attorney assisted by Mr. Edwin Webiro, learned State Attorney.

Upon completion of all preliminaries, the Final – Pre Trial Conference was conducted and the following issues were framed by this Court:-

- 1) *Whether the Plaintiff is the lawful owner of the disputed land.*
- 2) *Whether the Demolition Notice issued by the Defendants was illegal.*
- 3) *Whether the Plaintiff's house No. KIM/KMB/3901 at Kimara Temboni was constructed in a road reserve.*
- 4) *To what reliefs are the parties entitled.*

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the court invoked its power under Order XIX Rule 1 of the Civil Procedure Code Cap. 33 [R.E 2019] and ordered the facts of this case be proved by an affidavit. The Plaintiffs were ordered to file the affidavits of his witnesses before or by 16th June, 2020 and the Defendants filed their affidavits on 14th July, 2020.

To prove the above issues, the Plaintiffs' side had two witnesses, Ms. Dina Onyango, who testified as **PW1**, Mr. Francis Lukas Mcharange, who testifies as **PW1**, Mr. Khalid Maulid Nkana, who testified as **PW2**. The Defendants called one witness; Mr. Johnson Rutachirwa, who testified as **DW1**.

The Plaintiff's side tendered a total of six (6) documentary Exhibits to wit; a Sale Agreement dated 16th May, 1998 was admitted by this Court and marked as **Exhibit P1**. Land rent taxes was admitted by this Court and collectively marked as **Exhibit P2**. A notice of 7 days to demolish the wall was admitted by this Court and marked as **Exhibit P3**. A Valuation Report was admitted by this Court and marked as **Exhibit P4**. Photo of the suit premises was admitted by this Court and marked as **Exhibit P5** and a Demand Notice was admitted by this Court and marked as **Exhibit P6**. The Defendants tendered one (1) documentary Exhibits to wit; a Witness Statement that was admitted and marked as **Exhibit D1**.

In his effort to prove his case the Plaintiff who paddled his own canoe in this matter appeared in Court and through his affidavit which was adopted by this court he testified as follows; he is the lawful owner of the disputed land. The Plaintiff testified to the effect that on 16th May, 1998 he purchased

a parcel of unsurveyed land at Kimara Temboni area in Kinodoni District at the consideration of Tshs. 1,500,000/= from Mr. Mustafa Kondo Viame and he constructed a house thereon which was numbered KIM/LMB/3901. The Plaintiff testified that the parcel of land was located 80 meters from the main road such as Morogoro road which is not within the road reserve whatsoever because there were boundary demarcation which marks the end of the road reserve the same was fixed in the land named Mama Mkapa and the TANESCO poles were fixed thereto. He testified that the beacons were fixed a long time before he purchased the disputed land and another beacon was fixed in his land in 2007 when he was already occupied the family house.

The Plaintiff went on to testify that he lived with his family peaceful without any interference until on 17th October, 2017 when he was served with a 7 days' Notice from the 1st Defendant who required him to demolish the house since it was alleged that the same was constructed in the road reserve. The Plaintiff argued that before receive the said illegal notice, the Defendants attempted to demolish his house two times without issuing any notice. He testified that they marked his house X and wrote *Bomoa*, his family and neighbours stopped the Defendants from their illegal activities.

The Plaintiff valiantly said that despite the notice was illegal as it was short notice and he was threatened, he decided to register a valuer M/S Trace Associates Ltd who valued his house before demolition and came with a report revealing that the said house valued Tshs. 241,000,000/=.

The Plaintiff did not end there he said that he wrote a demand letter with the intention to sue the Defendants but they refused to rescind their demolition orders and to compensate him before demolition. The Plaintiff testified that he decided to demolish his house since he avoided paying demolition costs and witnessed his neighbour houses along Morogoro road being demolished without allowing them to vacate their properties. He testified that he took pictures of the said premises before demolishing the same. The Plaintiff vehemently testified that the demolition orders were illegal and caused him and his family unnecessary inconvenience and mental torture. He claimed for Tshs. 2,000,000,000/= being punitive exemplary and general damages.

To substantiate his testimony, PW1 on 04th August, 2021 tendered six documentary evidence as follows; A Sale Agreement dated 16th May, 1998 was admitted by this Court and marked as **Exhibit P1**. Receipt of Land rent

taxes was admitted by this Court and collectively marked as **Exhibit P2**. A Demolition Notice of 7 days was admitted by this Court and marked as **Exhibit P3**. A Valuation Report was admitted by this Court and marked as **Exhibit P4**. Photos of the suit premises were admitted by this Court and marked as **Exhibit P5** and a Demand Notice was admitted by this Court and marked as **Exhibit P6**.

On the strength of the above testimony, the Plaintiff testified that for the interest of justice he beckoned upon this Court to grant his prayers as prayed in the Complaint and allow the suit with costs.

When PW1 was cross examined by Mr. Edwin, learned State Attorney, he testified that a Demolition Notice was issued by the 1st Defendant to Francis Machajange (Exh.P2). He went on to testify that the Valuation Report is dated 19th October, 2017 and he lodged the instant suit on 12th February, 2018. The Plaintiff testified further that the Chief valuer did not approve the Valuation Report. He insisted that the suit plot is 80 meters from the road. The Plaintiff went on to testify that in 1998 the road reserve poles were placed 121 meters. He did not know how many meters one is supposed to keep for road reserve and he did not know if he was within the road reserve

or not. He added that the said receipts are samples to confirm that he was paying land taxes.

During re - examination by Mr. Jamhuri, the Plaintiff testified that he paid the land taxes at TRA at Kinondoni Municipal. He said that he was not informed earlier that he occupied the road reserve.

Khalid Maulid Mkana testified as PW2. He started by praying this Court to admit his affidavit and form part of his testimony. In his affidavit which forms part of his testimony, PW2 testified that he purchased an unsurveyed land in 1995 at Kimaa Vihambe and constructed a house in 1996, and stayed therein peacefully. PW2 testified that in 1998 PW1 bought a parcel of unsurveyed land approximately 20 meters and from Mustafa Kondo Vihambe. PW2 testified that PW1 constructed a house in 1998 and lived therein with his family until 2007 when the Defendants threatens him to demolish the Plaintiff's house without issuing a 30 days' notice.

PW2 testified that the said house along Morogoro road was not marked X to show that it was subjected to be demolished. PW2 testified that in 2017 when he was coming from his work he found Policemen fully armed with a

bulldozer ready to demolish PW1 house, his house, and their neighbor's house. He said that he asked them if they have any notice and if they have informed the Executive Ward Officer. He testified that on the said material date they failed to demolish the said houses and after a week when they went back, PW2 showed them the beacon which was fixed in 2007, they again failed to demolish the said houses. PW2 went on to testify that they claimed that they will demolish PW1 house regardless of the said beacons. He went on to testify they issued PW1 with a 7 days' notice and commended him to demolish the said house.

He continued to testify that PW1 decided to demolish his house to avoid unnecessary costs. PW2 testified that the demolition order was issued without consideration of the beacons which showed the end of the road reserve. PW2 insisted that the said plot was not within the road reserve since there were demarcations showing the boundaries. He testified that there were TANESCO poles were fixed in 2007, while other beacons were fixed a long time ago before they purchased the said plots. It was PW2 testimony that the demolition orders were illegal since there was no 30 days' notice issued to PW1 and the 7 days' notice was full of threats. He went on to testify

that PW1 family was left with no permanent settlement and the same has caused mental torture to the Plaintiff.

On the strength of his testimony, PW2 urged this court to grant Plaintiff's prayers as prayed in the Plaint.

When PW2 was cross examined by Mr. Edwin, learned State Attorney he said that he is residing in Mbezi Temboni. PW2 testified that PW1 bought the suit land in 1998 and he is his relative and neighbour. He testified that from PW1 premises to his house is approximately 25 meters. He testified that his house was not demolished. He testified that from the main road to his house is approximately 105 meters and from PW1 house to the main road is approximately 80 meters. PW2 testified that he was certain that PW1 house was not within the road reserve area. He said that there was a beacon in 80 meters. PW2 strongly testified that the Demolition Notice was not valid, he testified that he was not served with any notice.

When PW2 was cross examined by Ms. Happiness, learned Principal State Attorney, he testified that his house was not demolished because it was not within the road reserve area. PW2 testified that he was not aware of

Government building permit documents but he insisted that the seller sold the plot to PW1 legally.

When PW2 was re-examined by Mr. Jamhuri, he testified that he is a retired officer he said that the distance from PW1 house to his premise is 25 meters.

In defence, Johnson Rutechula, started by tendering his affidavit and prayed for this court to admit the same and form part of his testimony. DW1 affidavit was admitted and marked as Exhibit D1. DW1 testified to the effect that he is employed by the 1st defendant, working in the Office of the Regional Manager at Dra es salaam as a Sociologist. DW1 testified that he is dealing with sensitization to community activities teaching the importance of new projects which are to be constructed under the supervision of the 1st Defendant, Regional Manager. DW1 testified that he was assigned to inspect and identify the encroachers of the road reserve along Morogoro road, the stretch from Ubungu to Kiluvya. DW1 went on to testify that from 2014 onwards, they identified the encroachers of the road reserves by drawing a mark X and they wrote BOMOA to the houses which were built in the road reserve.

DW1 continued to testify that encroaches of the road reserve of 121.5 meters on each side from the center of the road were issued notices, requiring them to demolish their houses and vacate the road reserve. DW1 testified that despite the notices issued with a mark X nothing was demolished by the encroachers until 17th October, 2017 when they issued another notice to the Plaintiff demanding him to demolish his house and other improvement made in the road reserve. DW1 testified that the road reserve along the said area is 121.5 meters on each side from the center of the road as specified in the Road Act No. 13 of 2017.

DW1 did not end there he testified that on 17th October, 2017, PW1 was served with a notice to demolish his house which was located at Kimara Temboni, which was built in the road reserve titled; Notice of 7 days to demolish the wall, building, and remove business within the road reserve. DW1 testified that PW1 property that ought to be demolished was the whole house that was erected in the road reserve in contravention of the law. DW1 said that following the notice PW1 decided to demolish his house to save his belongings. DW1 went on to testify that PW1 purchased the said plot along Morogoro road measured width 121.5 meters from the center of the road

since 1932. DW1 strongly testified that the Plaintiff is not entitled to any compensation because the house was illegally erected in the road reserve.

On the strength of the above testimony, in the interest of justice DW1 beckoned upon this court to dismiss the suit because the disputed house was erected in the road reserve in contravention of the law.

When DW1 was cross examined by Mr. Jamhuri, learned counsel for the Defendant he testified that he does not know if the Plaintiff was compensated since the law was enacted in 1932. DW1 testified that the Ministry for Land issued a notice in 1994. He said that he did not know they served PW1 in July, 2014 with a 7 days' notice, and in May, 2014 a 30 days' notice was issued. DW1 testified that he did not know why PW1 was not served with a 30 days' notice. DW1 testified that not all who invaded the road reserve were served with a notice. DW1 testified that they were issuing stop orders to restrain the encroachers not to continue with construction process. DW1 continued to testify that they restored the boundaries by placing huge beacons. DW1 testified that Morogoro road is the same road. DW1 testified further that they cannot restrict one to build without adhering to the law.

During re-examination by Ms. Happiness, learned Principal State Attorney DW1 testified that the law is clear to all encroachers and they are not entitled to compensation.

When DW1 was re-examined by Mr. Edwin, learned State Attorney, DW1 testified that Morogoro road is different from other high ways or main roads which connects Regions. He testified that the width of the Morogoro road measures 45 to 60 meters, different from other roads. He said that the corridors changes depending on a particular road. DW1 testified that it is their duty to safeguard the reserve road and inform and restrain people not to build in road reserve areas. DW1 testified that in doing so they have remained them in 1994, 2014 and the operation took place in 2017.

Having heard the testimonies of both parties and considering the final submission of the learned counsel for the Plaintiff and the learned State Attorney; I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in civil litigation and which will guide this Court in the course of determining this suit. Section 110 of the Evidence Act, Cap.33 [R.E 2019] places the burden of proof on the party making the assertion that partly desires a Court to believe him and

pronounce judgment in his favour. Section 110 (1) of the Act provides as follows:-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

Similarly, in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 it was held that *"he who alleged must prove the allegations"*.

From the foregoing, let me now confront the issues framed for the determination of the present dispute between the parties. In addressing the first issue *whether the Plaintiff is the lawful owner of the disputed land*.

The analyses of this issue show that the parties herein lock horns on whether the Plaintiff was the lawful owner of the suit property. In a chronological account of the ownership of the property that the Plaintiff presented; he testified that on 16th May, 1998, he bought a parcel of unsurveyed landed property at Kimara District within the City of Dar es Salaam from one Mustapher Kondo. I wish to refer to paragraph 6 of the Plaintiff where the Plaintiff has indicated this fact, that he is a legal owner of

the house situated at unsurveyed land at Kimara Temboni area in Kinondoni District. In paragraph 7 of the Plaint, the Plaintiff testified that he build a residential house Number KIM/KMB/3901 and he was paying municipal levy and land tax. The Plaintiff in his witness affidavit testified that he occupied the disputed land since 1998 as evidenced by a sale of agreement dated 6th May, 1998 (Exh.P2). The fact that the Plaintiff bought an unsurveyed piece of land and he tendered a sale of agreement and receipt to prove that he was paying land taxes means he was a legal owner of the said piece of land in exclusion of the road reserve area.

Addressing the third issue, *whether the Plaintiff's house No. KIM/KMB/3901 located at Kimara Temboni was constructed in the road reserve.* The Plaintiff on his side testified that the suit premises was built within the beacons which were installed by the Defendants. Both Plaintiffs testified to the effect that the Plaintiff's house was constructed 80 meters from the main road. On the Defendant's averment and as testified by DW1, that the suit premises was constructed within 121.5 meters from the center of the main road.

In a chronological account of the demolition of buildings on road reserve that the Defendant presented, his only one witness, Johnson Rutechula, DW1 testified to the extent that he was assigned a task to identify persons who had encroached road reserve along Morogoro road from Ubungo to Kiluvya. DW1 in accomplishing his days to day duties was making sure that the road reserve is protected from intrusive activities. DW1 testified in length that the width of the Morogoro highway road is different from other highways, as per the Road Act (the Highway Ordinance Cap.167) GN. 54 of 1932 121.5 meters from the center of the road on both sides for areas between Kiluvya. Therefore all people who were residing along the road reserve along the Dar es Salaam – Morogoro road were supposed to keep distance as per section 52 of the Highway Act, Cap. 167 to mean land which lies within the distance of 121. Meters from the center of the road on both sides for areas between Kiluvya to Coast Region. Therefore the requirement to keep 121.5 meters is statutorily imposed by the law.

From the evidence on record, it is undisputed fact the disputed landed property falls within the width meters stated in law as part of Dar es Salaam, Morogoro highway. Thus, the Plaintiff constructed his house inside reserved

121.5 meters from the centre of Morogoro highway road. The Plaintiff was 80 meters away from the main road, as rightly submitted by the learned State Attorney that 80 meters are within 121.5 meters, it means that the Plaintiff has been illegally occupying and using the portion of the land within that road reserved area.

In the light of the above findings that the disputed area falls within the width of 121.5 meters as stipulated in the law as part of Dar es Salaam to Morogoro Highway, I find that the Defendant through TANROADS acted to initiate measures to bring the Plaintiff's illegal intrusion to halt. In the case of **Mr. Mason Shaba and 143 Others v the Ministry of Work**, Land Case No. 201 of 2005 (unreported) Hon. Ndika, J (as he then was) held that:-

".... I find it justifiable that the Defendants through TANROADS, acted to initiate measures to bring the illegal intrusion to a halt. I so hold bearing in mind that TANROAD is the executive agency with a statutory mandate for construction, maintenance and protection of all designated roads in the country. Issuance and services of notices to vacate, as was the case in the instant suit, was necessary step to

ensure that Dar es Salaam- Morogoro Highway and road serve was protected from all kinds of intrusive activities or illegal occupation and use...”

The Plaintiff claims that he acquired the suit land and was paying land taxes to the relevant authorities. Conceivably, it is imperative to note that the fact that he was paying land taxes in respect to the portion of land in the area in dispute, the payments do not validate or approve ownership of the encroached areas/plots of land which the money was paid.

Applying the above evidence and authorities in the instant case I find that the Plaintiff's claims are unfounded the same cannot stand therefore this issue is answered in negative.

Answering the second issue on *whether the demolition notice issued by the Defendants was illegal*. Referring to paragraph 9 of the Plaint, it appears to be the gist of the basis of Plaintiff's claim that the Defendants did not issue a demolition notice as required by the law. The Plaintiff in his witness affidavit specifically paragraphs 4, 5 6, and 7 testified that he lived in the

disputed house from 1999 to 2017 when the Defendants threatened to demolish the Plaintiff's house without issuing a 30 days' notice.

The Plaintiff further testified that there was no X mark and the word BOMOA in the house which was subjected to demolition. The Plaintiff on paragraph 8 of the Complaint claimed that on 17th October, 2017 the 1st Defendant officials issued a 7 notice to demolish the Plaintiff's house alleging that the same was constructed in the road reserve. The Defendants in their testimony admitted that they issued a 7 days' notice which normally is issued as a reminder notice after the 30 days' notice.

It is my considered view that the issue of 30 days' notice and the mark X and BOMOA was required to be adhered to by the Defendant. However, guided by the analysis of the first and second issue, it is my respectful opinion that since the Plaintiff was a trespasser, the 30 days' notice had no any effect. Considering that the Plaintiff was notified to demolish his house and the Plaintiff was able to demolition his house and serve his belongings.

Having analysed the evidence on record, I fully subscribe to the learned State Attorney submission that the demolition notice to the Plaintiff was legally. Therefore this issue is answered in negative.

Next for consideration is the fourth issue, *to what reliefs are the parties entitled*. The Plaintiff has tried to establish his case and justify compensation. He is claiming for specific damages and has relied on his testimony on the Valuation Report (Exh.P4). A glance at the Plaintiff Valuation Report, he has admitted that the Valuation Report was not approved by the Chief Government Valuer who is a masterpiece in producing an authentic Valuation. Section 7 of the Valuation and Valuers of Registration Act of 2016, empowers the Chief Government Valuer to approve or disapprove the valuation report or visit the property which is a subject of valuation for verification. In case the Chief Government Valuer is not satisfied he may order another registered valuer to conduct the valuation. Therefore, the Plaintiff's was required to comply with the requirement stipulated under section 7 of the Valuation and Valuers of Registration Act of 2016.

Above all, guided by the evidence of all parties and observations and analysis of all issues, it is without a speck of doubt that the Defendants' evidence overweighs the evidence of the Plaintiff. The Plaintiff was required to prove his allegations. One of the canon principles of civil justice is for the person who alleges to prove his allegation. The same was held in the case the **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 at 677, it was stated that:-

"He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. "

Applying the above authorities, in the instant appeal, I have to say that the Defendants proved that the road reserve was 121.5 meters and the Plaintiff's house was constructed within the reserve area. The same means the Plaintiff was a trespasser and a trespasser is not entitled to compensation. Therefore, the Plaintiff has failed to prove this allegation to the required standard; a standard higher than the not have any flicker of doubt that the evidence of the Defendant was heavier. Therefore the reliefs claimed by the Plaintiff cannot be granted.

In the upshot, I dismiss the suit with no order as to costs.

Order accordingly.

DATED at Dar es Salaam this 28th September,, 2021.




A.Z.MGEYEKWA

JUDGE

28.09.2021

Judgment delivered on 28th September, 2021 Mr. Ezekiel Joel, learned counsel for the Plaintiff and Mr. Felix Chakira, learned counsel for the Defendants.




A.Z.MGEYEKWA

JUDGE

28.09.2021

Right to appeal full explained.