IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 49 OF 2019

TRAVERTINE HOTEL LIMITED ..... PLAINTIFF

VERSUS

KINONDONI MUNICIPAL COUNCIL ..... DEFENDANT

JUDGMENT

OPIYO, J.

The instant suit follows the actions of the defendant above named, Kinondoni Municipal Council, of demolishing the plaintiff's fence, bar, and associated utensils. The defendant's actions have been viewed to be unlawful and now the plaintiff claims among others a compensation to the tune of Two Billion Tanzanian Shillings (2,000,000,000/=), being damages for loss of business, frustration of accommodation facility, insecurity to the plaintiff's clients, disruption of the plaintiff projections plans including payment of salaries to her employees and other running costs.

The defendant strongly disputed the claims from the plaintiff and insisted that the same need to be strictly proved before this court. Furthermore, by

way of a counter claim, Kinondoni Municipal Council (plaintiff) claims against Travertine Hotel Limited(defendant) a total of 839,520,000/= being the payment of loss of rental revenue as mesne profit for the defendant's acts of continuously invading, trespassing and unlawful construction of structures on Plot No. 300 Block D, Magomeni Area within Kinondoni Municipality. That, the said land being owned by the plaintiff in the counter claim has been unlawfully commercially used by the defendant who operates her business in the erected structures for not less than 18 years. Also, the plaintiff in the counter claim further claimed a total of 5,000,000/= being the costs of removing the developments made by the defendant.

Both parties enjoyed legal representation, learned Advocate Kephas Mayanje appeared for the plaintiff while Salehe Mohamed and Neto Mwambalaswa (Solicitors) appeared for the defendant. When the suit was called for hearing the following issues for determination were agreed Upon

(1) Who is the lawful owner of the suit premises?
(2) Whether the demolition of suit property was lawful?
(3) If the 2nd issue is answered in the negative, whether the plaintiff suffered damage and in if in the affirmative, whether the defendant is entitled to compensation for loss of income from rental charges?
(4) To what reliefs are the parties entitled to?

The plaintiff had one witness and one exhibit to prove her case while the defendant had three witnesses and two exhibits. PW1, one Bernarda John

Lamba, Manager, Hotel Travertine of Sinza, stated that, she is a manager of the plaintiff since construction of the hotel building from 1990. She was there as a supervisor of the construction and now, a Hotel Manager. That, previously it was referred to as Capital Hotel. Later, name changed to Travertine in 2004 after commencement of business. She went on to say that, in 1995 they requested for an access road and a Car Park for Hotel from Kinondoni Municipal Council. The Municipal council then directed them to pay those who were owning temporary shops (vioski) around the area, about ten of them. The reply letter from the council was admitted as exhibit P1. That her father John Lamba paid 2,912,000/= for ten vioski to the Director of Kinondoni Municipal Council and the payment receipts were collectively admitted as exhibit P2. After that they developed the area by constructing wall and inserted a gate. They also constructed a bar and store for storing beverages parked with fridges, freezers and beverages of different kind, TV set etc. Security room was as well constructed in the area. That, they had run the business for about 23 years until in 2018 when she noticed defendant's officials' unusual presence in the area.

After a week, she received a letter from defendant requiring removal of a wall on their own costs. PW1 decided to go see the Municipal Engineer and she was told to reply to the notice that was sent to them. She replied annexing the evidence of being allocated the area legally. That, after two weeks or 3 waiting for their reply, the defendant invaded the premises and destroyed the wall one night. PW1 insisted that they got a big loss of about 2 billion as several Television sets and mattresses were also stolen in the

process. Some customers ran away without paying their bills during the commotion. She insisted that, the defendant did not act fairly, she is therefore liable to pay for the loss occasioned and costs of the suit.

When cross-examined by Mohamed (solicitor) PW1 maintained that, Plot No. 136, 137 and 138 is owned by Travertine Hotel. They are surveyed plots. The title deeds are not in the name of Travertine Hotel. The Plots are in the name of John Lamba who is the owner of Traventine Hotel. That, they had requested for access road and parking area and were given. After removal of vioski they got the parking lot, also constructed a wall, bar and store in the area. That the council did not give them ownership document for the land, but they had paid for compensating the vioski owners. That they have no letter of offer or title deed for that piece of land. PW1 stated that the permission that was given to them over the suit was like the same was sold to them as they paid for it. That, they requested for access road and after being granted they closed that road for their own purposes.

On re-examination PW1 insisted that, they have been in that area since 1995, after paying compensation in terms of Exhibit P2 collectively. That, although they had requested for parking lot and access road, after the area was given to them, they constructed wall because it was theirs after paying for it. That was all for the plaintiff's case.

Defence case opened with the testimony Esther Karibueli Shao, Land Officer of Kinondoni Municipal Council who testified that Plot Nos 136, 137 and Plot

138 Block D Magomeni are owned by individuals, but Plot No. 300 block Magomeni is owned by the Kinondoni Municipal Council and has a title deed which was admitted as exhibit D1. The size of Plot No. 300 is square feet 63,430, designated for market construction. It was originally under the City Council and upon split it was given to Kinondoni Municipal Council. That, the claim by Travertine hotel is not correct as the area had shops which were at the access road. The plaintiff paid to get access road to her hotel. Therefore, it is not true that Municipal Council trespassed her property rather, it is her who trespassed to the Municipal Council's land by constructing a wall engulfing the same. She prayed for the land to be restored to the council and compensation for use of defendant's land.

When cross-examined, DW1 stated that as per records, the title deed was prepared in April 2010 and registered on 19th December 2013. That she is not aware if the plaintiff stayed on the disputed land for more than 20 years. According to TP Plan the area was long designated for market.

DW2 was Isack Musa Kashangaki, Municipal Engineer at Kinondoni Municipal Council whose office deals with construction issues at the Council including preparation of drawings, supervision of constructions and issuance of building permits. He testified that, the claim by the plaintiff is baseless. He denied trespassing plaintiff's piece of land. What they did was to clear the site on Plot No. 300 for construction of the Modern Market. That, when they reached the area, they found part of bar in defendants plot No. 300 and security room plus a wall constructed by the plaintiff. Upon realizing that,

they notified plaintiff to remove her properties and structures within 15 days as per exhibit D2. She never replied. After some time, the defendant conducted site clearance by removing what the plaintiff could not remove upon notice. The exercise was conducted at around 1pm following previous notice. That on the fateful day, security people were present in their room. They asked them to remove their items before defendant could proceed with demolition of the wall and other structures. After the exercise, nothing happened until he heard about this case.

When cross-examined, DW1 maintained that he has been at the council since 2010 as an Engineer. That, they have been owning the property ever since. That, before the demolition exercise there was both verbal and written notice to remove properties.

DW3, one Zahur Rashid Hamuna, testified that the Kinondoni Municipal council have lost almost 800,000,000/= for the plaintiff occupying their property without paying the council any penny for all 18 years. The amount was arrived at, because the place could have been used commercially for parking by those coming to the market. They could have got 2000 per vehicle on 70 motor vehicles parking per day. He continued to say that, now the parking is 5,000/- per day per motor vehicle, therefore, the amount of 2,000/- is in the lowest side. 2000 x 70 = 140,000/- per day x 18 years is about 800,000,000/-.

He insisted that the defendant's prayers in counter claim be granted for public interest, but plaintiff prayers are baseless, the same should be dismissed with costs.

When cross-examined DW3 stated that, he was employed by the council in 2008. The suit land is a market space located at plot No. 300. It is still a market to date. The defendant/plaintiff to counter claim claims against her because she denied her use of her piece of land for a long time by encroaching to the area. On re-examination, DW3 insisted that about 795 square meters of the defendant's land was encroached by the plaintiff.

DW4, Hussein Halfan Hussen, a Land surveyor at Kinondoni Municipal Council, testified that, Plot No. 300 has no relation with the plots of plaintiff. The plot No. 300 is surrounded by road, North is Morogoro Road, East, South and West have street roads surrounding the area. The claim by the plaintiff that, they were allocated Plot in question is baseless. No piece of land was in the plan that could have possibly been allocated to plaintiff. That, according to their documents the owner of Plot No. 300 is the Municipal Council of Kinondoni. They have a survey Plan, title deed as well as deed plan for this property (exhibit D3). He went on to say that, according to the survey plan, plot No. 300 is sq feet 65,430. Survey plan is of 1969. The defendant started owning the property in 2010 according to his recollection. All along it has been a market, so it was owned by City Council, until when Municipal councils were established. He said further that, in survey, what comes first is deed plan, and later title deed with deed plan. Survey plan

has plan No. and Registered No. 14498. The same No is in a deed plan. That, it is true plot No. 300 was invaded or trespassed by owners of plot No. 136, 137 and 138. They trespassed on access road and part of plot No. 300. That, when they were in process of developing the market in verification of boundaries, they found that the area was trespassed. They gave notice to the relevant authorities to facilitate the boundary revival and survey. The area was surrounded by the road on all sides so there were no neighbors to involve in the survey exercise. After noting the trespass, he informed the department concerned in writing about trespass on about 795 square meters by the plaintiff.

On cross examination, DW4 stated that, the area is for market use, and it has to be used for that purpose, unless there is change of use. In re-examination, DW4 testified that, the vioski that were paid for seemed, as per interpretation of Exhibit P1, to have been along the access road.

After completion of hearing, both sides had a chance to file their final submissions. The parties' respective arguments will be drawn when they become relevant in disposing the issues. The first issue is who is the lawful owner of the suit premises. In answering this issue, Mr. Kephas maintained that the plaintiff's right of occupation of the suit premises was derived from the owners of vioski after paying the compensation required. The payment was made to the Dar Es Salaam City Council in 1995, thereafter he constructed the Hotel, bar and security building. Therefore, the evidence is clear that the suit land was allocated to the plaintiff, he argued. As for the

defendant's counter claim, he argued that the same is time barred as it has been claimed after the lapse of 12 years as per Part I, Item 22 of the Schedule to the Law of Limitations Act. Mr. Kephas cited the case of **Shaban Nassor versus Rajab Simba (1967) HCD, 233**, where it was held that:-

> *"The court is reluctant to disturb persons who have been in occupation of the land for a long period, and having said that, he refused to give remedy where the party seeking such remedy delayed to bring the action for 18 years."*

On his part counsel for the defendant, one Mr. Salehe Mohamed maintained that the plaintiff failed to prove her case on balance of probability subject to section 110(1) & (2), and 111 of the Evidence Act Cap 6 R.E 2019. He cited the case of **Hemed Said versus Mohamed Mbilu (1984), TLR 113** for the authority that the person whose evidence is heavier than that of the other is the one who must win. He insisted that the testimony of PW1 does not prove that the plaintiff owns the suit land which she claims to have been allocated to her after paying compensation to the vioski owners. What is clear from the testimony of PW1 was the arrangement to grant the plaintiff access road for smooth operation of the hotel business. He went on to insist that, the land in question was designed to be used for construction of Magomeni Market by the defendant who was and still is the rightful owner.

Mr. Salehe went on to argue that, even if the plaintiff relies on the doctrine of adverse possession that she has been in occupation of the suit land for

more than 12 years undisturbed, still her claim fails to cumulatively prove all tenements for the one entitled to the ownership by adverse possession as stated in the case of **Moses versus Lovegrove(1952), and Hughes versus Griffin(1969)1 All ER 460,** as quoted in **Bhoke Kitangíta versus Makuru Mahemba, Civil Appeal No. 222 of 2017, Court of Appeal of Tanzania at Mwanza, (unreported)**, which requires the claimant to cumulatively prove the following:-

a) *That there had been absence of possession by the true owner through abandonment*;
b) *That, the adverse possessor had been in actual possession of the piece of land;*
c) *That the adverse possessor had no color of right to be there other than his entry and occupation;*
d) *That, the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;*
e) *That, there was sufficient animus dispossess and an animo possidend*
f) *That the statutory period, in this case twelve (12) years, had lapsed;*
g) *That the nature of the property was such that in the light of the foregoing/ adverse possession would result."*

He argued that the above pre-requisites were not at all met by the plaintiff, therefore he is not a lawful owner of the disputed property.

It is trite law that one who alleges must prove (s. 110(1) & (2), and 111 of the Evidence Act). Plaintiff alleges that she is the lawful owner of the disputed property, to discharge the obligation under the above provision she had to prove so. What the plaintiff have for such proof in our case is the documents in exhibit P2 collectively which is a proof of payment to ten temporary vioski to get access to what she had asked for from the first defendant. Getting the access road and parking which according to all looks of the arrangement between them, in my view, was for temporary use. No proof of the same being allocated to her for ownership. That is the reason she never applied for ownership documents like he did for her other adjacent plots, she legally occupies, and which are not under dispute in here. The payment to the then alleged vioki owners was meant to relocate those who were already allowed to use the area. It did not mean payment for purchase of the piece of land. Exhibit P1 say it all explains it all by referring to access road only not any piece of land for ownership. That is the reason no purchase agreement was ever signed between the parties for all those over 20 years the plaintiff had been in occupation and use of the area. The entire testimony of PW1 does not prove that the plaintiff owns the suit land as she claims to have been allocated to her after paying compensation to the vioski owners. The vioski occupiers who were paid were not owners either to be able to transfer title to the plaintiff. They were paid not for purchase of the area, but to compensate them for what they had already put in for being allowed to use the place.

The plaintiff can also not successful claim ownership based on adverse possession. This is because one cannot claim being granted and adverse possession at the same time. Adverse possessor is trespasser who stays with the knowledge of the owner. The one who has been given permission to use can never be a trespasser to benefit from adverse possession principle. According to the case of **Bhoke Kitangíta versus Makuru Mahemba** (supra) cited by Mr. Salehe, for one to successfully claim ownership through adverse possession he has to prove among other there had been absence of possession by the true owner through abandonment and the adverse possessor had no color of right to be there other than his entry and occupation. These conditions were never there as the plaintiff herself had already claimed ownership through purchase, so the abandonment was ruled out. Also, it is on record that the plaintiff was permitted to be there by the appellant through compensating the former users, he cannot claim he acquired the place adversely. What plaintiff has is long use which does not in itself qualify him ownership by adverse possession, being an invitee as noted above. From this finding the answer to the first issue is that the defendant is the lawful owner of the disputed property. In the case of **Swaleh V. Salim (1972) HCD 140** supports the position, by the holding that:-

> " *No invitee can exclude his host, whatever the length of his occupation."*

The second issue is whether the demolition of the structures found in the suit property by the defendant was lawful. As it has already been found in the first issue that the defendant is the lawful owner of the disputed property, and the plaintiff was her invitee the determination of lawfulness of demolition of the structure she had kept entails looking on compliance with the law of repossessing the property from an invitee. Mr. Salehe argued that the demolition of the plaintiff's structures on the suit land was lawful and complied with Regulation 124(1) (a-c) and 137 (1) (a) and (d), (2) and (4) of the Local Government (Urban Authorities) Development Regulations of 2008. I agree with him because the plaintiff was perfectly notified of the defendant's desire to reposes the property. Exhibit tendered by plaintiff herself constituting notice of demolition from the defendant proves that. In the circumstances giving notice was enough to legalise the process. Then second issue is answered is answered in the affirmative.

I now turn to the third issue that; if the 2nd issue is answered in the negative, whether the plaintiff suffered damage and in if in the affirmative, whether the defendant is entitled to compensation for loss of income from rental charges. The second issue has been answered in the affirmative, the issue for determination is now as to whether the defendant who is the plaintiff to the counter claim entitled to compensation for loss of income from rental charges. The entitlement of the defendant to any compensation depended on the way plaintiff come into possession and use of the disputed property. We have seen in discussion of first issue that the plaintiff was an invitee through compensation to the first users, no lease agreement was entered

between the two to entitle the other for rental charges. He was not a trespasser to the property to deny the defendant from gaining from the property to attract any compensation. That is the reason when he wanted to claim for his land, he got it merely through issuing of notice to the then possessor. One cannot be compensated for what he never qualified for. The answer to this issue is therefore that the defendant is not entitled to any compensation for the alleged missed rent.

The last issue is on the reliefs the parties are entitled to. From the discussion on the above issues neither of the parties is entitled to their claims. The plaintiff is entitled to nothing because she failed to establish and prove that she owned the land in question over which the demolition of the alleged structures took place. Above all, she failed to prove if the demolition was done unlawfully and that she suffered any loss. On the other hand, the defendant has proved that she owns the suit land, therefore the demolition was done lawfully after compliance with statutory procedure of issuing notice to the other side, not unlawfully as agued by the plaintiff.

In the counter claim, the defendant in the main suit claims for 839,520,000/= as mesne profit for the defendant's acts invading their land and using it commercially for all that long. Also, for a total of 5,000,000/= being the costs of removing the developments made by the defendant. It has already been established that plaintiff did not invade the property, rather she was an invitee who just overstayed in the area. She was made to pay compensation to those who had already gotten right of use of the area, thus

her occupation was not through adverse possession. Therefore, no mesne profit and any other compensation can possibly be claimed from her for occupation of the area. For the reason, the defendant/plaintiff to the counter claim has also failed to prove her claim. Thus, both, the suit and counterclaim are meritless. The same are dismissed. no order as to costs.

M. P. OPIYO,

JUDGE

4/6/2021