

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND NO. 44 OF 2018

LAMECK NYELA PLAINTIFF

VERSUS

TANZANIA NATIONAL ROADS AGENCY 1ST DEFENDANT

PERMANENT SECRETARY, MINISTRY OF LANDS

HOUSING AND SETTLEMENT DEVELOPMENT2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

Date of Last Order: 19.05.2022

Date of Judgment: 31.05.2022

A.Z. MGEYEKWA, J

At the centre of controversy between LAMECK NYELA, the Plaintiff and Tanzania National Roads Agency and the Attorney General, the Defendants is an owner of plot No. 1347 Block "A' Located at Mbezi Luis, Ubungo Municipality-Dar es Salaam.

In the Amended Complaint, the Plaintiff prays for Judgment and Decree against the defendants for a declaration that the Plaintiff is the lawful owner of the suit premises, that the suit properties are not located within the road reserve, that the 1st defendant's act of issuing Notice to the plaintiff to demolish the suit premises is illegal and void ab-initio. The Plaintiff is also praying for this court to issue an order for permanent injunction restraining the Defendants, its agents, and/or workmen from disturbing in any manner the plaintiff on his Plot No. 1347 Block "A" located at Mbezi Luis Ubungo Municipality – Dar es Salaam, payment of General damages as this court deems fit to grant, costs of this suit and any other relief. In alternatively, the Plaintiff is praying for this court to order the 1st and 2nd Defendants to pay him Tshs.500,000,000/= (Tanzanian Shillings Five Hundred Million) as compensation for the affected improvements of the suit premises.

In response to the Complaint, on 6th April, 2019 the Defendants filed a joined Written Statement of Defence disputing all the claims and urged this court to dismiss the entire suit with costs.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brother Hon. Awadhi, J (as he then was) and Hon. Mango, J. I thank my predecessor for keeping the records well and on track. I thus gathered and recorded what transpired at the disputed

land and now I have to evaluate the evidence adduced by the witnesses to determine and decide on the matter in controversy.

The facts, as can be deciphered from the pleadings and evidence on record go thus: sometime in 1992 the Plaintiff purchased a piece of land estimated to be one acre at **Mbezi Inn Street-Mbezi Luis, Ubungo Municipality- Dar es salaam within Kinondoni Municipality**, and that the plaintiff applied for survey in which the survey was conducted in 2007 as per **Annexure LN1**, that unfortunately the Ministry of Land responsible in issuing the Certificate of Title after survey, did not issue the Certificate of Title in the whole land applied for, instead the plaintiff was informed by the Ministry of Land, that a piece of his surveyed land was within the road reserve, hence that it has to be excluded.

That in 2008 the Ministry of Land issued to the Plaintiff a Certificate of Occupancy with **Title No. 83873**, the Plaintiff developed the said premises and was paying land rent without t any inconveniences. Hence on 07.12.2017, surprisingly without any prior Notice, the Plaintiff received a letter from the 1st Defendant alerting him to vacate the suit premises within 7 days on the ground that the same was also within the road reserve and that was the genesis of this suit.

At all the material time, the Plaintiff was represented by Mr. Cathbert Mbiling'i, learned Advocate while the Defendants were represented Mr.

Daniel Nyakiha, assisted by Mr. Peter Sengelema, learned State Attorneys. During the Final Pre-trial Conference, the following issues were framed by this Court:-

- 1) *Whether the plaintiff is the lawful owner of the suit premises?*
- 2) *Whether the plaintiff's house is located within the road reserve?*
- 3) *To what relief are parties entitled?*

In what seemed to be a highly contested trial, the Plaintiff called two witnesses and the Defendants summoned three witnesses. The Plaintiff's case was founded on Mr. Lameck Nyela, who testified as **PW1**, and Mrs. Prisca Lameck Nyela (**PW2**). The Defendants' called two witnesses; Mr. Dismas Nyoni (**DW1**). Hellen Philipo who testified as **DW2**.

Due to the circumstance of this case, this Court called two witnesses, from the Plaintiff's side and the Defendants' side. However, only one witness from the Plaintiff's side was able to testify in Court.

The Plaintiff's side tendered a total of five (5) documented exhibits; a copy of Map (Exh.P1), a Certified copy of Certified Title (Exh.P2), a Notice to vacate the suit premises issued by TANROAD on 7th December, 2017 (Exh. P3), Land rent Payment receipts (Exh. P4) and a 90 days' Notice (Exh. P5).

By the order of this court parties were ordered to file final submissions on 19th May, 2022 whereby both parties complied with the court order effectually, and the final submissions from both parties were extremely considered in articulating this Judgment.

Mr. Cathbert was the first one to kick the ball rolling leading PW1 to express the facts. PW1 stated that he purchased the said suit land in 1992, where he developed the land and constructed a house, and started living there in 2000. PW1 stated that in 2007, the survey was by the Kinondoni Municipal Council on Plot No. 1347 Block A at Mbezi Luis Kinondoni Municipal Dar es Salaam City, upon the Plaintiff's application. The Plaintiff tendered survey plan which was admitted as Exhibit P1.

He further stated that the premise is located sidelong old Morogoro road whereas the Ministry for Lands after the survey was conducted, informed PW1 that most of his premises were within the road reserve, hence that, the Certificate of Title cannot be issued to the whole premises applied for, but only to part of the land, that was not within the road reserve, from that basis, that in 2008 the Ministry for Lands issued to the plaintiff the Certificate of Occupancy No. 83873 on Plot No. 1347 Block "A" at Mbezi Luis Area in Kinondoni Municipal covering a small portion of land that was not within the road reserve where the plaintiff had built a residential house valued at TZS 500,000,000/= in 2009,

which is now the source of this dispute, PW1 tendered the Certificate of Occupancy which was admitted as Exhibit P2. PW1 testified that the Certificate of Title reveals that he is the owner of the suit premises.

PW1 further stated that on 07th December, 2017 he received a Notice from the 1st defendant with an intention to demolish his house requiring him to vacate from the suit premises within 7 days, the said Notice was admitted as **Exhibit P3**.

When cross-examined, PW1 stated that the distance from the road to the inserted beacon is 121 meters. He testified that his 13 houses and 1 Godown that were within the road reserve were demolished and PW1 did not complain. PW1 responded that the width of the road on both sides is 121.5 meters.

Prisca Lameck Nyela (PW2) aged 53 testified to the effect that PW1 is her husband and that they are the owners of a building at the suit property along Morogoro road. She testified that the area which was declared to be within the road reserve was excluded in issuing the Certificate of Occupancy whereas 13 houses were demolished, except the existing house that was beyond the road reserve to the extent of *130 meters* from the old Morogoro road. She testified that there is a difference between the new Morogoro road and the old Morogoro road.

PW2 went on to testify that if the 1st defendants want to demolish and acquire the suit land then they need to compensate PW1 for the development made therein, because had the suit premises been within the road reserve the Ministry for Land could have taken due diligence as per **Section 25 (3) of the Land Act Cap 113 [R.E. 2019]** which provides:

'(3) Where an application is for a right of occupancy in reserved land, the Commissioner shall refer that application to the office or the public body having jurisdiction over that reserved land and shall take account of any representations that such official or such public body shall make on that application'

During cross-examination, PW2 responded that she is not sure whether they obtained a building permit.

On 30th March, 2022 PW1 was recalled to testify. PW1 tendered land rent receipts from 2011 to 2017 to prove that he was paying rent. However, the Defendants' State Attorney objected to the tendering of the said receipts as the same were not accompanied by Notice to Produce despite the fact that were pleaded under paragraph 11 of the Plaint contrary to Section 64 of the Law of Evidence Act Cap 6 [R.E. 2019], the receipts, therefore, were admitted for identification purposes.

In defence, Dismas Oswald Nyoni, a Principal Technician working with TANROAD testified to the effect that he was employed since 1991 and that his duty is helping the regional Manager in supervising road and

bridge maintenance and also supervising the Engineering activities. He further testified that PW1's house is located on Plot No. 1347 Block 'A' at Mbezi Luis area within Kinondoni Municipality along Morogoro road. He testified that the suit premises is within 121.5 meters of the road reserve as per TANROAD beacons.

DW1 testified to the effect that they were about to demolish the plaintiff's house but he had undergone severe operations and therefore opted to postpone as per PW1's request in which before returning to him the 1st was stopped by the court order.

During cross-examined by Mr. Cathbert, DW1 replied that the Authority responsible for issuing a Certificate of Occupancy is the Ministry of Land and the Municipal is responsible for all the procedures to about in obtaining the valid Certificate of Title. And that the Plaintiff's house was not marked with X because PW1 was absent. Hence from Morogoro road to the TANROAD beacon, the distance is 121.5 meters and the Plaintiff's house is within those meters subject to demolition to pave way for a service road along Morogoro road.

During re-examination, DW1 stated that it is PW1 who requested two weeks to postpone the demolition exercise since he was sick and had undergone a severe operation that was physically seen.

DW2, Hellen Philipo, Principal Land Officer working with the Ministry for Lands Housing and Settlement in Dar es salaam, was sworn and testified that The Certificate of title in Exhibit P2 over Plot No. 1347 Block 'A' at Mbezi Luis Area in Kinondoni Municipality was issued by the Commissioner for Lands, hence that it is valid with no any incumbrancers. He further stated that procedures in obtaining the said Certificate of Title were properly followed by PW1.

During cross-examination, DW2 testified that she believes the Ministry for Land was misrepresented. However, the Certificate of Title No. 83873 to PW1 is correct under section 22 of the Land Act, Cap. 113 [R.E. 2019]. DW2 further testified that despite the fact that she is the advisor to the Commissioner but the Certificate of Title was issued to the Plaintiff in 2008, before she was employed.

DW2 went on to testify that in case it will be noted that the suit land is within the road reserve, then the remedy is to revoke the title and pay compensation to the owner. She stated that there was no any document to prove that PW1 purchased the suit premises.

During the visit to the *locus in quo* on 11th April, 2022 at 15:30hrs, Mr. Cathbert recalled PW1 who tried to show that the TANROAD beacons were placed around his gate but the same was not visible and on the other right side besides his house also the beacons were not visible.

PW1 further stated that his house is not within the road reserve. He further stated that the said Certificate of Title was never revoked as per **sections 48 and 49(1) of Land Act Cap 113 [R.E. 2019]**, hence that the reliefs claimed are pleaded, thus the PW1 has to be compensated as per **section 30 of the Civil Procedure Code Cap 33 [R.E. 2019]** to the tune of **500,000,000/=** and other costs.

When cross-examined by Mr. Daniel State Attorney PW1 replied that the internet cable passing through the roof of his house was installed in 2017 with permission from TANROAD measurement.

DW1 was able to show the beacon parallel to the trees and stated that from the centre of Morogoro road to where the beacon is installed is 121.5 meters. He stated that the beacon marks the end of the road.

When cross-examined by Mr. Cathbert DW1 stated that he is not aware of when the beacon was installed. DW1 further testified that the old Morogoro road is within the center of the current Morogoro road and that the distance is measured perpendicular to the plaintiff's house from the center of the Morogoro road in a total of 8 ways.

For matter of lucidity, this court called a court witness to clarify whether or not the old Morogoro road is within the center of the new Morogoro road as alleged by the Plaintiff to be able to determine the

matter at stake regarding measuring the said 121.5 meters from the center of old Morogoro road and new Morogoro road.

CW1 Jumanne Elison Nyanza, stated that the new Morogoro road was reconstructed in 2002. He testified to the effect that from the city of Dar es Salaam heading to Morogoro on the left side is the old Morogoro road. In his testimony, he was certain that the new Morogoro road was constructed beside the old Morogoro road. He testified that from old Morogoro road to PW1's house is approximately 135 to 130 meters. He further stated that the old Morogoro road was left out and the same is in pieces "*changarawe*" road.

During cross-examination, he testified that if PW1 acquired the title in 2009 then the measurement of the suit land started from the current Morogoro road.

Having heard the testimonies of both parties and considering the final submissions 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 Section 110 of the Evidence Act, Cap.6 [R.E 2019] which 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."

The provision was well elaborated in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 that *"He who alleges must prove the allegations"*.

From the foregoing, let me now confront the issues framed for the determination of the present dispute. In addressing the first issue *whether the Plaintiff is the lawful owner of the disputed land*. The proof of ownership of land in our jurisprudence was discussed in various cases such as **Amina Maulid & 2 Others v Ramadhan Juma**, Civil Appeal No. 35 of 2019 (CAT) at Mwanza where among other things the Court held that:-

"...a person with a certificate thereof will always be taken the lawful owner unless it is proved that the certificate was not lawfully obtained."

In the case of **Jane Kimaro v Vicky Adili (Administrator of the Estate of the late Adili Daniel Mande)** Civil Appeal No. 2012 of 2016 among other things it was observed that:-

"Ownership of land starts in whose name that estate or interest is registered." In the instant case, the plaintiff unequivocally proved that the suit piece of land Plot No.1347 Block A situated at Mbezi Luis Area in Kinondoni (Now Ubungo Municipality) is registered in his name. The evidence to that effect is viding the Certificate of Title No. 83873. It was also evidenced through various receipts that the Plaintiff has been paying land rent and all other taxes pertaining to the suit landed property. From the evidence on record, it is clear that the Plaintiff is the registered occupier of the suit property.

Addressing the second issue, *whether the house in dispute is in the road reserve area.* The Plaintiff testified to the effect that the suit premises was built within the beacons which were installed by the Defendants and those said premises were allocated to him by a 2nd Defendant, a Government authority. The Plaintiff testified to the effect that the Plaintiff's house was constructed approximately 130 meters from the old main road. The Plaintiff tendered a survey plan (Exh.P1) to prove that he was certain that he acquires a plot that was free from any encumbrances.

In a chronological account of constructing the suit premises with the road reserve that the Defendant presented his first witness, Dismas

Oswald Nyoni, Principal Officer. He testified to the extent that he was assigned a task to identify persons who had encroached on a road reserve along Morogoro road. 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 121.5 meters from the center of the road on both sides of the road area. DW2 testified that the Plaintiff initiated the process of the survey from the customary ownership and was the one who indicated the boundaries. However, as long as DW2 acknowledged that the Certificate of Occupancy was issued by the Commissioner of Land then the blames cannot be shifted to the Plaintiff.

The Defendants' learned State Attorney in his final submission strongly contended that the Plaintiff's house is within the road reserve area. The 1st Defendant issued a Notice of demolition. On the Defendant's averment and as testified by DW1, the suit premises was constructed within 121.5 meters from the center of the main road.

In my findings, I have noted that the 1st Defendant in his claims that the suit premises was constructed within the road reserve based his argument on the measurements of the width of the main road, and the requirement to keep 121.5 meters is statutorily imposed by the law.

I have noted that the defendants are challenging the validity of the granted right of occupancy allotted to the Plaintiff on the mere fact that it was done so in the road reserve. I am aware that according to section 6 (1) (a) (vii), of the Land Act, Cap 113, land designated or set aside under the provisions of the Roads Act, Cap.167, forms part of the Reserved Land. The question that arises from the outset is whether it is justifiable for the Authority to grant a right of occupancy to the Plaintiff over the land which is part of the reserved land.

The said question brought me to incidents of granted right of occupancy set forth in section 22 of the Land Act, Cap.113 which provides that:-

“ 22.- (1) A granted right of occupancy shall be-

(a) granted by the President;

*(b) **in general or reserved land;***

(c) of land which has been surveyed;...” [Emphasis added].

From the wording of section 22 of the Land Act, Cap.113, it is possible to grant right of occupancy in reserved land. In the present case, the grant right of occupancy was granted to the Plaintiff by the competent authority and he has been in occupation of such land for so long. In my opinion, the fact that the Plaintiff has proved to be the

registered owner of the suit property, this Court cannot rule otherwise, it is bound to recognize and declare the Plaintiff owner of the suit piece of land. Therefore, this issue is answered in favour of the Plaintiff.

I now turn to the third issue. The Plaintiff is claiming general damage. The position of the law is clear when it comes to the award of general damage; it is the discretion of the court. Lord Dunedin in **Admiralty Commissioners S. S. Susguehann** (1926) A.C 655 on page 661 stated thus:-

"If the damage is general, then it must be averred that such damage has been suffered, but the quantification of such damage is a question of the jury."

Applying the above authority in the case at hand means the Plaintiff was duty-bound to prove the amount claimed. PW1 in his testimony failed to poof the damage he allegedly suffered. Therefore it is my considered view that this prayer crumbles.

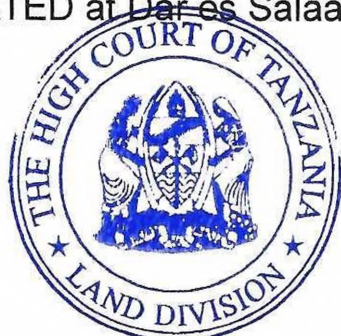
For the aforesaid findings, I declare the Plaintiff is the lawful owner of Plot No. 1347 Block 'A' located at Mbezi Luis, Ubungo Municipality within Dar es Salaam. In case the Defendants want to acquire the suit plot for public interest then they are required to follow a proper procedure to

acquire the land which is legally been occupied by the Plaintiff.

Consequently, this suit is hereby allowed. No order as to the costs.

Order accordingly.

DATED at Dar es Salaam this 31st May, 2022.




A.Z.MGEYEKWA

JUDGE

31.05.2022

Judgment delivered on 31st May, 2022 in the presence of Mr. Cathbert

Mbiling'I, learned counsel for the Plaintiff.




A.Z.MGEYEKWA

JUDGE

31.05.2022