

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 236 OF 2021

ANDREW JUMBE MKISI (As Administrator
of the Estate of the Late NEEMA BARNABAS MKISI) **PLAINTIFF**

VERSUS

OBEID ZABRON RUSUMO **1ST DEFENDANT**

THE COMMISSIONER FOR LANDS **2ND DEFENDANT**

THE HON. ATTORNEY GENERAL **3RD DEFENDANT**

JUDGMENT

14/03/2023 & 30/03/2023

E.B. LUVANDA, J.

The Plaintiff mentioned above is complaining against encroachment of his un surveyed plot measuring quarter acre situated at Nyakasangwe, Nakalekwa Area Wazo Kinondoni, alleged committed by the First Defendant above named, when the later surveying to establish Plot No. 15149 Kinondoni/Nyakasangwe in view of expanding existing boundaries of Nuru Njema School to meet requirement of Ministry of Education for erection of dormitory, which plan and survey was approved by the second Defendant by way of granting tenure of ninety nine years lease of certificate right of occupancy title number DSM1001476, exhibit D2. The Plaintiff who is suing as an administrator of the estate of the late

Neema Barnabas Mkisi, as per a letter of administration exhibit P1, explained that the deceased acquired that land on 1/3/2001 by way of purchasing from James Bonifasi (PW2) via a sale agreement of a farm, exhibit P5 and her ownership was confirmed by the Hamlet Executive Officer at Madale Street on 30/10/2013 as per exhibit P4. Thereafter in 2014, the deceased started to develop by constructing a two rooms house up to the stage of roofing (rafter).

After the demise of Neema Barnabas Mkisi who passed away on 23/10/2015 as per a death certificate exhibit P2, the Plaintiff took over by initiating a process of survey as a matter of abiding to the ongoing survey plan sponsored by the hamlet where he paid a survey fee a sum of Tzs. 196,000, as per pay in or deposit slip, exhibit P6. It was a tell-tale of the plaintiff that in 2019 when he was at the verge of raftering, arose a dispute, he was served by an order restraining him to proceed with construction. By way of a flash back, PW2 who appeared to support a title and tenure of the Plaintiff, stated that he acquired a suit plot by way of inheritance from his father in 1998 following demise of his (PW2) father in 1997. PW2 was unable to account as to how his father acquired it, apart from seeing his father owning it by way of cultivating vegetables for several years.

On the other hand, the First Defendant, pleaded in his written statement of defence that his area of 5.5 acres was formerly located at Boko Village in Bunju Ward (near Boko Magereza Area), later changed to Boko Street Government (sic, council), which was further divided to form Nyakasangwe Hamlet Council Nakalekwa Suburb being the current location of his land. According to the First Defendant, he acquired the 5.5 acres of land by way of gift, bequeathed (sic, formerly handed over) to him by his father Zabron Rusumo (now deceased) on 17/7/1998 as per a gift deed, exhibit D9.

The first Defendant averred that his father the late Zabron Rusumo bequeathed (sic, handed over) to him, those 5.5 acres by way of breaking off that piece of land from seven acres of land which his late father purchased from Mussa Mrisho as per a sale agreement for a farm executed on 6/9/1995, exhibit D3. Thereafter, the first Defendant surveyed his 5.5 acres after evicting some trespassers, and was declared officially registered occupier and tenure of Plot No. 15149 Block ... of an area measuring 21,318.92 Square metres, as per a title deed exhibit D2 as aforesaid.

The following issues were framed: One, whether the Plaintiff is the lawful owner of the suit property; Two, whether survey and creation of

Plot No. 15149 Kinondoni, Nyakasangwe was lawfully conducted; Three, to what reliefs are the parties entitled to.

Mr. George Geoffrey Ngemela, Mr. Thomas Rwebangira and Ms. Wivina Rwebangira learned Advocates interchangeably made appearance to prosecute the Plaintiff's case.

Mr. Goodchance Lyimo learned Counsel appeared for the first Defendant and Mr. Urso Luoga learned State Attorney appeared for the second and third Defendants.

As for the issue number one, the Plaintiff maintained that his wife the late Neema Barnabas Mkisi had a good title, as per sale agreement and validation or confirmation of title exhibit P5 and P4 respectively, showing she acquired it on 1/3/2001 from PW2, who alleged to have inherited it in 1998 from his father who passed away in 1997 after occupying it for a couple of years. The Plaintiff contended that the plan, survey and grant of title exhibit D2, comprising of 21,318.92 square metres, includes encroachment of his quarter acre owned by his wife (deceased).

On defence, the first Defendant, pleaded facts distancing away his surveyed land comprising 21,318.92 square metres depicted in exhibit D2, alleged that it is currently located at Nakalekwa Suburb, Nyangasangwe Street at Boko Ward, portraying that his land and the disputed land are two oceans apart.

It is true that exhibit D9 and D3 depict the land of the first Defendant is located at Boko Magereza, Boko Village, Bunju Ward. Therein, there is no mention of the name Nakalekwa or Nyakasangwe. In exhibit D2 location of a plot is Nyakasangwe Kinondoni.

However, Issa Abdallah (DW2) clarified that Nyakasangwe was established in 2014 formerly was Boko Magereza. According to DW2 Nyakasangwe Street was established by taking a bit piece of or portion of land from Boko and Madale.

In a notice to produce additional documents and notice of production of original documents filed by the second and third Defendants on 11/07/2022, among the documents attached is a letter for residence introduction in respect of the first Defendant submitted to the second Defendant for purpose of compliance of procedures processing a title deed, exhibit D2, on 6/5/2019, the Chairperson cum Executive Officer Nyakasangwe hamlet, made the following introduction,

*'Namtambulisha mtajwa mwenye picha kwa ajili ya
KUTAMBULIWA ENEO LA SHULE YA NURU NJEMA LIPO ENEO
LA NAKALEKWA MTAU WA NYAKASANGWE KATA YA WAZO
KWA SASA'*

This letter was not tendered into evidence, although the learned State Attorney in the said notice, bragged to tender the original document.

Therefore allegations and argument that the area of the first Defendant is located at Boko Ward, is a concoct.

Exhibit P5 depict the suit land is located at Nakalekwa Area, Madale Street. Exhibit P4 confirmed that the suit plot is located at Nakalekwa Suburb, Madale Street Wazo Ward. In exhibit P3 minutes of the deceased clan meeting at page 2, agenda number 3 item 3 mention a plot of deceased located near Nuru Njema School at Nakalekwa Salasala Madale Ward Kinondoni Dar es Salaam. Therefore, an argument that Madale Ward does not exist or that Salasala is on a different location or that is a distance of 5 or 10 kilometres to Nyakalekwa, is immaterial. Herein, clan members of the deceased were trying to locate properties of the deceased as such those minor discrepancy are inevitable to occur. Also, an argument that there are three schools of Nuru Njema, being Nuru Njema Nakalekwa, Nuru Njema Halisi and Nuru Njema Tegeta, is also immaterial. Suffices to say that the land in exhibit P4, P5 and D2 are non-mutually exclusive. My undertaking is grounded on fact that during cross examination by the Plaintiff's lawyer, DW1 stated that it is true that Wazo Ward was established from Kunduchi and that his documentation pertain to the same place of a dispute.

Another cluster of defence by the first Defendant, he paged the plaintiff to status of a trespasser. DW1 reckoned incidents of trespassers by

invaders who were stone crusher, alleged apart from discovering quarry of stones, they also invaded farms and erected structures in a form of huts for residential, as also supported by DW2.

It is to be noted that the alleged invasion and trespass by stone crushers, occurred in a period between 2007 and 2008, when those stone crushers alleged relocated there, as per DW1 and DW2. However, the first Defendant did not account the long occupancy of the Plaintiff counting way back from 1/3/2001, as per exhibit P5, and thereafter descending back to 1998 when PW2 alleged to have inherited it. The first Defendant did not account for the explanation of PW1 that in 2014 the deceased erected a structure of two rooms thereon. Neither stated as to why he remained mute till in 2019 when a dispute arose while a structure was at a roofing (rafter) stage. Importantly, the evidence of PW4 Mikidadi Salum Mkinda, PW5, Tupa Dago Mbarafu suggest that the first Defendant was there all long, developing his land slowly by piecemeal from nursery, two class rooms, preschool, until when arose a need for extension and expansion of his area to meet threshold of requirements on the rules of boarding school, it is when a dispute arose in 2019 at the time of constructing dormitory. Again, the first Defendant did not point finger direct to the Plaintiff as among invaders who

trespassed his land in 2008 during the alleged crises, insecurity and chaos of stone crushers.

Actually, the first Defendant was making a general complaint regarding a fracas of stone crushers, without saying specifically how and to what extent his farm land was affected, nor mentioned any stone crusher(s) who invaded his land.

Assuming the first Defendant meant those who were compensated via exhibit P9 collectively, including Mikidadi Salum Mkinda (PW4), Tupa Dago Mharuku (PW5), Madina Said Seleman, Rade Jerard Mlay, and Meja Mwachumu Ibrahim, were his trespassers to his land. But documentation (exhibit P9 collectively) betray the first Defendant. The title of those documents is coached on the following wordings

*'MALIPO YA MAENDELEZO YA WANANCHI WALIONGIZWA
KATIKA ENEO LA SHULE YA NURU NJEMA'*

In the said documents there is no mention of the word trespassers, invaders or encroachers. The document portray that plots for aforementioned were incorporated to the school of Nuru Njema. Nowhere depict that the first Defendant was claiming back or say redeeming his land. Even the contents reflect that compensation was paid due to development carried by those people and for reasons that their respective areas was incorporated in the area of Nuru Njema

School by virtue of Urban Planning Laws. Nowhere reveal that it is because the first Defendant was the lawful or legal owner of those areas subject for compensation. Also the first Defendant distanced that he is not responsible for those compensation, on explanation that it was done and undertaken by the suburb or hamlet council or office. But nowhere in exhibit P9 collectively, show that the suburb or hamlet office was involved on anyhow being effecting payment, compensating, raising fund, supervising payment, advising, reconciliation or doing anything in furtherance of those compensation. Worse still even the letter head or logo of hamlet or suburb office or any government being local or central government office, is missing in exhibit P9 collectively. Exhibit P9 collectively connote it was a private arrangement per se, that is why even the logo head is title, 'KAMATI YA WAKAZI MATAA WA NYAKASANGWE.' One could wonder if it was a formal committee of resident of Nyakasangwe Street, which the first Defendant recognized as such, now why in court is referring them as trespassers to his land.

On similar vein, the first Defendant disowned even the process of survey alleged it was wholly initiated done, supervised and sponsored by Kinondoni Municipal, committee for survey at Nyakasangwe, Ms. Afro Map, Director of Mapping and Survey, that were responsible to be sued for allegedly carrying out survey. This idea is a misplaced. This is

because the documentations which initiated the process of survey and ultimately grant of title exhibit D2, which were attached to a notice to produce and tender original documents filed on 11/7/2022 by the second and third Defendant, in respect of an introductory letter for residence, possession verification records and transaction fees for processing preparation of certificate of title, registration fees, deed plans fees, depict the applicants for survey is the first Defendant who also paid fees. But as I have said these crucial documents were not formerly tendered although the maker of a notice had bragged to tender original documents. All in all, this was a typical private undertaking.

The first Defendant also relied on a list of people who were eligible for compensation by the National Development Corporation (NDC) at Boko, for the intended acquiring of fifty acres for extension of the proposed project by the latter, which hitherto did not materialize.

It was the contention of the first Defendant that had the Plaintiff have an area at the disputed area as alleged from 1/3/2001, the deceased name could invariable feature in the list prepared in 2004, exhibit D11. However, Hussein Anderson Nyika (DW3) staff from NDC, conceded that a list for compensation exhibit D11 was limited to those mentioned therein, are the only one who were subject for compensation. In other words a list exhibit D11 which its text paper and ink does not suggest to

have been printed and existed the way back in 2004, for being new and fresh, is not exhaustive. In a letter exhibit D10 on which NDC requested an area of 50 acres for a promise to compensate owners of those farm, did not say that those 50 acres covers the whole Boko Village, nor said they were prepared to evict and re-locate residents and owners of farms at the entire Boko Village. Therefore, to say whoever purport to own land at Boko Village in early 2000's whose name is missing in exhibit D11 should be adjudged as having no area there, surely is a misplaced idea.

The first Defendant also attempted to derail the Plaintiff, by suggesting that his letter of administration exhibit P1 ceased to have legal effects after filing an inventory of final account of distribution of the deceased estate exhibit D5. But this idea is misplaced, inventory of account has nothing to do with validity of letter of administration. To my opinion, a letter of administration does not expiry upon filing an inventory of account, rather the same become invalid after either is revoked, annulled or surrendered to the appointing court. In absence of these three events taking place nothing else can invalidate a letter of administration. If I borrow a leaf from the provisions of section 71 of the Probate and Administration of Estates Act, Cap 352 R.E. 2019, it reads as follows,

'After any grant of probate or letters of administration, no person other than the person to whom the same shall have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until such probate or letters of administration shall have been revoked or annulled'

Also section 100 of Cap 352 (supra), provides,

'An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living'

In the case of **Omary Yusuph (Legal Representative of the Late Yusuph Haji) vs Albert Munuo**, Civil Appeal No. 12 of 2018, the Court of Appeal of Tanzania at Dar es Salaam, held I quote,

'It is our considered view that the existence of legal rights is an indispensable prerequisite of initiating any proceedings in a court of law. In this particular case, since Yusuph Haji had passed away, according to the law it is only the lawful appointed legal representative of the deceased who can sue or be sued for or on behalf of the deceased which is stipulated under the provisions of section 71 of the Probate and Administration Act [Cap 352 R.E. 2002]'

All said and done the balance tilt in favour of the Plaintiff. The first issue is in the affirmative that the Plaintiffs is the lawful owner of the suit

property of a quarter acre situated at Nyakasangwe, Nakalekwa Area Wazo Kinondoni.

Issue number two. This issue cannot detain me much, having ruled the Plaintiff as the lawful owner of property encroached by the first Defendant when extending and expanding his area for Nuru Njema School in survey, deed plan and ultimately certificate of title exhibit D2. And having ruled that the application for survey, planning and issuance of certificate of title was set on motion and mounted by the first Defendant as an individual, also confirmed by Helen Philip (DW6). Therefore, to my view survey and the entire process and procedure for creation of Plot No. 15149 Nyakasangwe Kinondoni, cannot sail through, for it is held to have been marred with irregularity for unlawful encroaching and appropriating other peoples neighbouring land without consent or consultation. This can be evidenced from a document for possession verification records item number (b) in a notice to produce original documents filed by the second and third Defendant on 11/07/2022, which was authored, signed and submitted by the first Defendant, at page two first section of the documents or form for verification of neighbours, the first Defendant indicated that in all four directions to wit North, East, South and West, his land borders road and

no single neighbour appended signature to allude that proposition. But these crucial documents were not formerly tendered in court.

The manner this document was crafted, suggest that the area of the first Defendant prior survey is surrounded by road. While the area which the first Defendant was given by his father via a gift deed exhibit D9 depict on the North border Kosta Michael, East border Mzee Zabron, South border Ndugu Mussa Mrisho, West border Ndugu Msongera. There is no explanation as to how and why these people vanished, extinguished and over sudden the un surveyed plot of 5.5 acres, in a verification form, reflect neighbours nil. Therefore, the explanation by Helen Philip (DW6) that the first Defendant had complied with a requirement of submitting a possession verification form recorded by neighbours, is misleading.

A mere fact that DW1 carved the road surrounding his land, is immaterial. This is because that was done while he was still holding land under customary tenure. I wonder DW6 who confirmed receiving exhibit D3 and D9 alongside the purported form for verification by neighbours, as to why did not reveal such a glaring discrepancy that a gift deed (exhibit D9) depict several neighbours who are missing in a form for verification by neighbours.

The argument for carving road one may say it was for purpose of saving as an access road to Nuru Njema School. But still a question is whether it was necessary to carve a road in all direction surrounding his plot prior survey. Why the first Defendant decided to abolish, extinguish all existing boundaries under customary tenure, while knowingly boundaries of his farmland are in cumbered with existing and unsettled disputes. Surely this pauses a serious concern and create doubt on the conduct of the first Defendant.

Suffices to say survey and creation of Plot No. 15149 Nyakasangwa Kinondoni, flawed procedures of survey for failure to take into account interest of third parties. Therefore, the second issue is answered in the affirmative.

Finally as to what reliefs are parties entitled to. Having ruled that the Plaintiff is the lawful owner of a suit land and having faulted the survey approved and granted right of occupancy issued by the second Defendant to the first Defendant, it therefore goes without gain saying that the first Defendant trespassed by way of encroaching the Plaintiff's land. Therefore, the first Defendant is ordered to give vacant possession and demolish all structures on the suit land. Meanwhile, the second Defendant is ordered to rectify the Land Register after re-survey of the

first Defendant's land in exclusion of a piece of land adjudged in favour of the Plaintiff.

The Plaintiff had claimed special damages for demolished house by the first Defendant a sum of Tsh 150,000,000. On cross examination by the learned Counsel for first Defendant, PW1 stated that he did not conduct valuation for demolished house, neither explained value or costs of construction nor explained as to where he procured construction buildings materials. A mere fact that PW1 said rafter was made by treated timber and bricks walling, is not enough to justify 150,000,000. As in the course of cross examination, PW1 conceded that he did not explain the total number of timber or its value. During re-examination, it is when PW1 said he claim that amount due to indicative price at Nakalekwa being between 30,000 up to 60,000 per square metre and his area is approximately 1,000 square metres, plus costs of a two rooms house at rafter stage being Tsh 10,000,000, including charges for the first Defendant who was using a house for storage of his building materials. However this explanation was made as an afterthought as it is a new fact introduced following a damage accrued during cross examination. These new facts were neither pleaded, nor put on examination in chief or cross examination, meaning the other side were

denied a chance to cross examine its veracity, as such they are disregarded. Therefore, a claim of Tsh 150,000,000 is slashed away for want of strict proof. The Plaintiff also pleaded *mesne* profit a sum of tsh 1,000,000 per month from 2019 to the date of vacant possession, but PW1 did not prosecute this claim. Therefore a claim for mesne profit is discarded. The Plaintiff pleaded a sum of Tsh 100,000,000 as general damages. On his examination on chief and cross examination, PW1 said nothing regarding this claim. An account for this claim featured at re-examination stage, where PW1 introduced issues of psychological torture, suffrage for demolition of his house, inconvenience for making follow up, at the end PW1 pleaded for a less sum of 40,000,000. But to my view all these were news facts taken as an afterthought, therefore are disregarded.

Be as it may, it is on record that two rooms of the Plaintiff were demolished by the first Defendant while at rafter stage. Although the Plaintiff did not prove actual costs for constructions, to my opinion, he is entitled to redress. Therefore, the first Defendant is ordered to pay the Plaintiff general damages a sum of Tsh 5,000,000.

I appreciate for a laboured final submission filed by Mr. Goodchance R. Lyimo learned Counsel for the first Defendant.

The suit succeed to the extent demonstrated above. The Plaintiff will have his costs from the first Defendant.



E.B. LUVANDA
JUDGE
30/03/2023

A large, stylized handwritten signature in blue ink, written over the printed name and date.