

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE No. 68 OF 2021

DAR ES SALAAM WATER AND SANITATION

AUTHORITY (DAWASA)1ST PLAINTIFF

THE ATTORNEY GENERAL.....2ND PLAINTIFF

VERSUS

TABU HASSAN (As legal representative of the late

SALMA PILI TAMAAMBELE).....1ST DEFENDANT

MSOLOPA AUCTION MART AND TRIBUNAL BROKER.....2ND DEFENDANT

JUDGMENT

3rd June 2023 & 28th July 2023

L. HEMED, J.

The dispute in this matter is centered on the ownership of a piece of land measuring 37.200 M X 34.641 X 40.230M X 44.380M situated at Boko, Kinondoni Municipality. To the plaintiffs, the suit land is surveyed and is referred to as Plot No.792/1 & 793/1 Block 'B' Boko Maji, Kinondoni Municipality. To the defendants, the suit piece of land is unsurveyed and is part of the estate of the late Salma Pili Tamambele.

The disputed piece of land is adjacent to the land known as Plot No.378 Block 'B' Boko Maji, Kinondoni Municipality which is undisputedly owned by the 1st Plaintiff. The two pieces of land are separated by Murram road.

The disputants in this matter are the Government entity, **DAR ES SALAAM WATER SUPPLY AND SANITATION AUTHORITY (DAWASA)** who are suing an individual **TABU HASSAN** (legal representative of the late SALMA PILI TAMAAMBELE) for trespass into the suit landed property.

The matter at hand stems from Land Case No.47 of 2005 which was instituted at the Ward Tribunal in the year 2005. The said case was lodged by five (5) person namely; **Mjengwa Hassani, Kasimu Chande, Richard Mairi, Ikki Omari** and **Peter Majogo** against **S. Kakwezi** and **DAWASA** claiming for a piece of land which was offered by the late **SALMA PILI TAMAAMBELE** to be used as graveyard and another piece of land which was alleged to belong to SALMA PILI TAMAAMBELE. Both pieces of land were fenced by the 1st Plaintiff herein (DAWASA) as part of its land.

The ward Tribunal for Bunju found that the piece of land which was dedicated by **Salma Pili Tamaambe** as graveyard should continue to be as planned. The ward tribunal also found that DAWASA had grabbed part of the land of **Bi. Salma Pili Tamambe**, it directed DAWASA to pull out from the said piece of land which was found to belong to Salma Pili Tamambe. The 1st defendant, having appointed administrator of the estate of the late Salma Pili Tamambe applied for execution of the decision of the ward tribunal where the 2nd defendant, **MSOLOPA INVESTMENT COMPANY LIMITED** was assigned the execution task by the District Land and Housing Tribunal for Kinondoni. The 2nd defendant carried out the execution in May 2021. The 1st Plaintiff attempted to object the execution process by presenting to the Tribunal objection proceedings *vide* Misc. Land Application No.703 of 2020 which ended up being struck out. In response thereto, the plaintiffs opted to lodge the instantaneous suit.

In this suit the plaintiffs pray for judgment, decree and orders against the defendants as follows:-

"(a) A declaratory order that the first Plaintiff is the lawful owner of the landed property Plot No.792/1

& 793/1, Block B situated at BOKO AREA, KINONDONI MUNICIPALITY at DAR ES SALAAM.

(b) A declaratory order that the Defendants has unlawfully and without any color of right and justification ordered the demolition of Plaintiff' house Plot No. 792/1 & 793/1, Block B situated at BOKO AREA, KINONDONI MUNICIPALITY at DAR ES SALAAM.

(c) A perpetual injunction against the Defendants, their agents, employees or any other person acting under their instruction to enter possession of the disputable landed property above named.

(d) That the Defendants be ordered to pay specific damages to the tune of TZS.1,000,000,000/= following the Defendant's demolition of the Plaintiffs' house which was situated in the suit premises.

(e) An order for payment of general damages not less than five hundred million Tanzanian shillings (TZS.500,000,000/=).

(f) Punitive damages as this Honourable Court may deem just and equitable to grant.

(g) Interest at current court rate on the claimed amount from the date of filing this suit to the day of full satisfaction of the decree.

(h) Costs of this suit; and

(i) Any other order(s) and/or relief(s) this Honourable Court may deem just and equitable to grant."

The defendants disputed the plaintiffs' claims of trespass. They pleaded further that the suit piece of land is part of the estate of the late Salma Pili Tamambebe. It was further stated that the suit piece of land was handed over to the 1st defendant by the 2nd defendant in execution of the decision of the Ward Tribunal for Bunju in Land Case No.47 of 2005.

On the day the matter was called for final pretrial conference, the following issues were framed as roadmap in the determination of the suit at hand. Issues framed were as follows:-

1. Whether the suit landed property in land case No.47 of 2005 at Bunju Ward Tribunal is the same as to this suit.
2. Who is the lawful owner of the suit land between the 1st Plaintiff (DAWASA) and the 1st Defendant.

3. Whether the demolition carried out by the Defendant is lawful.
4. Whether the first Plaintiff suffered damages.
5. To what reliefs are the parties entitled to.

The plaintiff called two witnesses. **PW1, HABEL LAZARO CHIBELNJE** the Electrical technician of the 1st plaintiff told the Court that the suit property was acquired by the then Ministry of water in 1975. The Ministry handed it over to the 1st Plaintiff in 1998. He tendered the documents handover certificate and the report of the committee, (exhibit P1). He testified that the property which was handed over to the 1st plaintiff included the Workshop and the house of the Workshop Manager.

It was adduced further that in 2002 the 1st Plaintiff was given the letter of offer and the survey plan (Exhibit "P2"). In 2005, the 1st Plaintiff erected poles around the land which was by then bare for purposes of protecting it. PW1 told the Court that in the same year a case was instituted at the Ward Tribunal for Bunju that the fence was planted in the 1st defendant's land and grave yard. The Ward Tribunal ended up ordering for removal of the fence poles which were planted by the 1st plaintiff and at

the cemetery. According to PW1, the poles were removed as directed by the ward Tribunal. He submitted the judgment of the Ward Tribunal (exhibit "P3").

In his testimony, PW1 told the court that the matter before the ward tribunal did not include the land which was already surveyed. He added that in 2018 the 1st Defendant filed Misc. Application No.703/2020 in the District Land and Housing Tribunal for Kinondoni to challenge the decision of the ward tribunal whose ruling was delivered on 10th May 2021 (exhibit "P4"). He adduced further that the demolition order was carried out in May 2021 by the 2nd defendant on the land which was not subject to the decision of the Ward Tribunal. When cross examined he told the court that he did not know how the Ministry acquired the land.

PW2 one DESDERY RUGEGIZA NDYETABULA, the surveyor who recognized exhibit "P2" the survey plan for Plots No.378, 792/1 and 793 /1 Block "B" Boko Kinondoni Municipality Dar es Salaam city supported the testimony of PW1. He told the court that the suit land has been surveyed as Plot No. 792/1 and 793/1.

On their part, the defendants paraded three (3) witnesses as follows; DW1, one IKKI OMARI KISONDO told the court that the suit land is at Boko Basihaya, near to DAWASCO. He adduced that, the suit land belong to the late Salma Tamaambele who acquired it from the village Council under the leadership of one Mashaka Mhunzi. He adduced further that DAWASA (the 1st defendant) invaded the suit land. The matter was reported to the Ward Tribunal for Bunju and it was decided in favour of Bi. Tamaambele.

DW2 VICTOR KIZITO KITEBI, an officer from MSOLOPA INVESTMENT and Tribunal Broker confirmed the testimony of DW1 and told the court that they were assigned by the District Land and Housing Tribunal for Kinondoni to execute the demolition order in the suit landed property. He adduced that they demolished the fence wire pursuant to Demolition Order in Misc. Application No.218 of 2005 dated 12th May 2021(exhibit "D1") under the supervision of the Police and handed over the property to 1st defendant (exhibit" D2").

The 1st defendant (DW3) who is the administratrix of the estate of the late Salma Pili Tamaa Mbele who passed away in 2015 (exhibit "D3").

She confirmed evidence adduced by DW1 that the suit piece of land was part of the land which was allocated to the late Salma Tamaambele by the village council (exhibit "D4"). According to DW3, the suit piece of the land is approximately half (1/2) an acre.

She testified further that the 1st plaintiff fenced the suit piece of land by wire fence including the graveyard. They reported the matter to the ward Tribunal for Bunju that ruled in their favour, that the suit land belong to the late Salma Tamaambele (exhibit P3). DW3 told the court that the District Land and Housing Tribunal executed the decision of the ward tribunal for Bunju through the 2nd defendant who handed it to her. She further testified that she effected search of the suit land to find out if it was registered and found it being unregistered. She tendered an Official Search (exhibit "D5") to that effect. According to DW3, the land in dispute is unsurveyed land located at BOKO BASIHAYA near DAWASA.

Having heard evidence from both parties, it is pertinent to determine the issues which were framed at the commencement of hearing. In determining the issues the court will be guided by the principle under section 110(1) and (2) of the Evidence Act, [Cap.6.RE 2019] and amplified

by the Court of Appeal of Tanzania in **Habiba Ahmadi Nangulukuta & 2 others vs Hassan Ausi Mchopa (the Administrator of the estate of the late Hassan Nalino) & Another**, Civil Appeal No.10 of 2022, thus:-

"The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof."

In determining the issues of this matter, I have opted to combine the 1st and 2nd issues together. Therefore, the questions as to **whether the suit landed property in land case No.47 of 2005 at Bunju Ward Tribunal is the same as to this suit;** and to **who is the lawful owner of the suit land between the 1st Plaintiff (DAWASA) and the 1st Defendant,** will be answered collectively.

In answering the said issues, I have opted to apply the common law doctrine of tracing the property as was stated in the case of **Taylor v Plumer** (1815 3M&S 562. The doctrine requires a property to be identifiable and distinguishable from other properties. My decision to apply the doctrine is based on the fact that the 1st Plaintiff claims ownership of

the suit property which to it, the land has been surveyed and is known as Plot No.792/1 & 793/1 Block 'B' Boko. They relied on exhibit P2, letter of offer issued on 24th May, 2002 and Survey Plan No. E' 301/195 of 08th March 2002. On the part of the defendants, they claim the same suit property as unsurveyed piece of land part of the land of five(5) acres which was allocated to the late Salma Pili Tamambebe in 1973 (exhibit D4), by Boko Village Council. The defendants also claim that this piece of land was the one which was subject matter at the ward Tribunal for Bunju in Land Case No. 47 of 2005 and subject to the execution proceedings at the District Land and Housing Tribunal for Kinondoni.

This was also confirmed by the Ward Tribunal for Bunju in its decision in Land Case No.47 of 2005 dated 7th September 2005 where it ordered thus:-

"3. Eneo lililotajwa la Bi Tamambebe liendelea kuwa mikononi mwake kwani Baraza hili limeridhika kuwa mmiliki wa eneo hilo ni Bi. Tamambebe na yeyote atakayetaka kutumia eneo hilo sharti akubaliane na Bi. Tamambebe na siyo vinginevyo, hivyo basi Dawasa wasijihusishe na lolote katika eneo hilo na wathamini Busara ya Bibi huyu alipoacha

*kuwabughudhi katika eneo walilojenga nyumba
karakana ambalo ni mali ya Bi. Tamambele.”*

It was also confirmed by DW2, the Principal Officer from MSOLOPA INVESTMENT and Tribunal Brokers, who informed the court that the suit piece of land was the one they handed over to the 1st defendant in execution of the Order of the District Land and Housing Tribunal in Misc. Application No.218 of 2005.

It appears that when the 1st plaintiff decided to survey its land in the year 2002, did not inform or involve the neighbours thereto including the 1st defendant. I am holding so because immediately after the survey the dispute regarding the grave yard and the suit land subject to the matter at hand arose. The none involvement of neighbours, implies that the plaintiff included in the survey land which ought to have not been made part of the survey. I managed to visit the *locus in quo* where PW1 and DW3 managed to show physically the suit piece of land. The disputed piece of land is located in residential area. It is actually separated from the land owned by DAWASA (1st Plaintiff), Plot No.378 Block 'B' Boko by morram road.

The physical location of the suit piece of land conclusively shows that DAWASA (the 1st Plaintiff) wrongly included the said piece of land in their

survey conducted in the 2002. In fact, it was part of the land owned by the late Salma Pili Tamambele. This piece of land which in survey Plan No.E'301/195 is known as Plot No. 792/1 & 793/1 Block 'B' Boko, is the one which the Ward Tribunal for Bunju declared to be the property of the late Salma Pili Tamambele. It is obvious that the said suit land was handed over to the 1st Defendant by the 2nd defendant while executing the decision of the ward tribunal. Having found that the suit piece of land was the same subject matter in Land Case No.47 of 2005, it is inevitable to answer the 2nd issue in favour of the 1st defendant that the suit piece of land is part of the estate of the late Salma Pili Tamambele.

Let me turn to the issue on **whether the demolition carried out by the Defendant is lawful**. Evidence on record clearly shows that MSOLOPA INVESTMENT and Tribunal Brokers were the ones assigned the execution process by the DLHT-Kinondoni *vide* the DEMOLITION ORDER dated 12th May 2021 (exhibit D1). According to the said Order, the 2nd Defendant was required to demolish all structures in the suit property and hand over the land to the 1st Defendant herein. Therefore, the fact that the demolition was carried out pursuant to the order of the Tribunal, it was undoubtedly lawful.

As to the issue **whether the first Plaintiff suffered damages**, I am of the firm view that this issue has a very short answer. This is because, having found that the suit property is part of the estate of the late Salma Pili Tamambele, and the fact that the demolition was carried out by the order of the DLHT for Kinondoni, then the plaintiffs suffered no damage that entitles them for damages.

In the final analysis, I find no merits in the suit and proceed to make the following orders:-

1. The entire suit is dismissed with costs.
2. The suit property which in Survey Plan No.E' 301/195 is known as Plot No.792/1 & 793/1 Block 'B' Boko, Kinondoni Municipality, is part of the estate of the late Salma Pili Tamambele.

It is so ordered.

DATED at DAR ES SALAAM this 28th July 2023.



[Signature]
L. HEMED

JUDGE