

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 270/2022**

SOPHIA NYAKUNGA MLOTE.....PLAINTIFF

VERSUS

EMMANUEL TARIMO.....1ST DEFENDANT

MARTHA MPAZE.....2ND DEFENDANT

JUDGMENT

7th to 13th December, 2023

E. B. LUVANDA, J.

The Plaintiff named above is suing the First and Second Defendant above named for trespassing and encroachment over her surveyed land located at Kigogo 'A' Fresh 'B' Dunda a formerly Pugu Kajiungeni/Mwakanga, held under a certificate of occupancy title No. 57732, Plots number one to nine, Block G comprising of 1.364 Ha, as per exhibit P1.

According to the Plaintiff Dr. Sophia Nyakunga Mlote (PW1), she purchased the suit land (unsurvey) from Jumbe Kibogodo the way back on 22/1/1997 (as per sale agreements exhibit P2 collectively) and surveyed it in between 2004/2005. PW1 asserted that later people started crossing over her land where on 23/9/2022 she assigned Ally Juma Segumba (PW2) who is a builder (mason) to construct a wall fence to protect her boundary.

PW2 alleged to have been stopped construction of a wall fence by the First and Second Defendant, while PW2 was at a verge of measuring with a rope in view of commencing excavating a foundation. It was the explanation of PW2 that the walling could invariably block access of the house of the Second Defendant. Meantime PW1 maintained that there is no existing road, and pleaded the road carved at the instance of the First and Second Defendant encroached portion of her Plots No.1, towards plots No. 7, 9 and 8 at 'L' shape, for about four meters width and caused destruction of her crops like coconut trees.

Angelo Aloyce (PW3) who is a professional surveyor who conducted boundary recovery of over the suit land post inception of these proceedings, confirmed seeing the newly carved road which he labeled road 'B' as per his report exhibit P5, depicting to have crossed on Plots No. 1, 2, 7, 8. However, on cross examination, PW3 conceded a fact that Plot No. 8 was wrongly included, it was erroneously recorded Plot 8 instead of Plot No. 9.

When this Court visited at the *locus in quo* on 23/11/2023, PW3 exhibited a substantial portion or part of a fence and house of the Second Defendant to have encroached into the surveyed land of PW1, along with the disputed road 'B' where the fence and house of the Second Defendant encroached by 475 square meters (The Plaintiff condoned and

relinquished) and a disputed road 'B' encroached by 553 square meters, as per the detail survey for parcel identification of Plots No. 1 to 9 Block G and picking up of existing features at Pugu Makanga, an attachment to exhibit P5.

The First and Second Defendants on the other land alleged that the disputed road is an ancient path. Martha Mpaze (DW2) asserted to have been using that road since 2007 and 2008 along her parents when visiting at their farmland to pick fruits, oranges and coconuts, also was used by other civilians, which fact was supported by Mbwana Said Msoma (DW4) who also witnessed sale of a farm to PW1. DW4 who alleged to have been living thereat for the past thirty years, asserted that at the time of exhibiting customary boundaries to PW1, they surrounded the farm and a road was on the side a plot of DW2. However, DW4 asserted that a dispute arose after the arrival of DW2.

Emmanuel Ernest Tarimo (DW1) asserted that the road in dispute is carved periodically by the grader of the Municipal Council under the sponsorship of the ward counselor one Emilda Timoth Sanjela (DW3), who supported this fact.

Essentially a dispute between the parties is wholly hinged over easement, PW1 and DW2 being neighbors, although seemingly ever since are unwilling for negotiation or amicable settlement. This can be evidenced

by DW2 who bragged seeing PW1 live or physically, for the first time on the material date during the commotion and misunderstanding, after PW2 was stopped fencing. When parties were summoned before the Regional Police Commander who alleged issued summons two times to DW1 and DW2, it was alleged only DW1 attended and distanced not been living at a disputed site. When DW2 was asked by this Court as to why the matter was not settled amicably, asserted it was due to difficulties owing to the trending harsh words due to this case. When DW2 was asked by this Court if she attended at the mediation session before the High Court Mediation Center, said she did not attend. When DW2 was asked by her Counsel as to why she think have been sued, said it is perhaps due to the theory of deep pocket over her. My preface, is rooted on a fact that under the cluster of easement, the law is much concentrated on negotiations between the dominant land (who for purpose of this case, is the Plaintiff) and the servient land or benefiting (for all intend invariably is the Second Defendant et al), see sections 147(4)(a), 148(4)(c) of the Land Act, Cap 113 R.E. 2019. Or where it is before the Commissioner for Lands, the is enjoined to initiate and facilitate negotiation for reaching consensus, see section 154(1)(b)(iii), of Cap 113 (supra). I have picked these provisions, by way of emphasis that easement by its nature involve adjoining land and neighbors, dialogue is therefore of paramount consideration.

These are not my words or personal opinion, for instance PW1 on, at her examination in chief bragged to believe on dialogue. At the *locus in quo*, PW1 vowed that throughout she was eager and wanted to have the matter settled amicably with encroachers and alleged to have engaged the hamlet chairman, because they are all (PW2 and encroachers) neighbors. Although DW1, DW2, DW4 accused PW1 to have frustrated dialogue by deploying police officers along a Defender on a date and at a place they resolved to convene for discussion, and thereby found their way to the Regional Police Commander, as aforesaid.

The law on how easement can be created is settled. In the case of **Alex Senkoro and Three others vs Eliambuya Lyimo (As Administrator of the Estate of Frederick Lyimo, Deceased)** Civil Appeal No. 16/2017 at page 22, the apex Court propounded,

*'At this point it is necessary to state how an easement can be created or acquired. As summarized by Dr. R.W. Tenga and Dr. S.J. Mramba in **Conveyancing and Disposition of Land in Tanzania: Law and Practice, 2nd Edition, Juris Publishers Limited, Dar es Salaam, 2020, at page 282 et seq, an easement can be created by express grant or by express reservation or by implication. In the first mode of creation, the parties can enter into an express agreement by executing a deed necessary for creating the easement on a land comprised in a right of***

*occupancy or lease or part of any of that land for the benefit of that other land – see section 146(1) of the Land Act. At common law, an express grant of easement must be done by deed or will but not by writing under hand or parole grant – see **Ruth Wamuchi Kamau** (supra). In the second mode, an easement is created by express reservation where the owner of the servient land does not actively grant but reserves an easement for himself or in favour of a land he retains. The final mode concerns implied easements, which are created in terms of section 146(4) and (5) of the Land Act out of implication’*

Going by the provision of the Land Act, Cap 113 R.E. 2019, specifically on easement predominantly created by the order of the Court and fiat of the Commissioner for Lands to wit access to land locked land, application for way leave, under section 152 Cap 113 (supra) or communal right of way under section 153, or right of way, are all subject to payment of compensation.

Section 156(1) Cap 113 (supra) with marginal note, compensation in respect of public right of way, provide

"Subject to the provisions of this section compensation shall be payable to any person for the use of land, of which he is in lawful or actual occupation, as a communal right of way and, with respect to a way leave, in addition to any compensation for the use of land for any damage suffered in respect of trees, crops and buildings as a result of the creation of such way leave."

Likewise, every easement, analogous rights modified or extinguished by the court are subject to payment of just and reasonable compensation, see section 158(5) Cap 113 (supra).

Without prejudice to the a foregoing recap and preface, the issues framed for determination: One, whether the disputed land is a public road or property of the Plaintiff; Two, whether the Defendants are trespassers on the disputed land; Three, what reliefs are parties entitled.

Issue number one, DW1, DW2, DW3 and DW4 all maintained a stance that the disputed road is a public road. DW4 alleged that at the time when PW1 purchased the land, her area was surrounded by the road, and asserted further that the disputed road was among existing roads by then. Unfortunate, the sale agreements exhibit P2 collectively, do not support the contention by DW4, nowhere it reflects the purchased farm is surrounded or bordered by any existing road or path on either side. Rather exhibit P2 collectively suggest that a farm of PW1 shares a common border with other people mentioned therein. In other words, their farms are adjoining. In exhibit P2 collectively, nowhere it reflects those people and PW1 are separated by road on either side of the farm.

Above all, if DW4 meant that the farm of PW1 was surrounded by roads on all sides, and that the disputed road was existing, now why in a survey

drawing plan conducted on 23/3/2005 does not reflect any existing road crossing along plots No. 1, 7, and 9 as per drawing plan part of exhibit P1.

Indeed, DW2 said she was given her plot by her parents as a gift to her sendoff sometimes in 2009. According to DW2 she started visiting there in between 2007 and 2008, but asserted to had no recollection as to when and to whom her parents acquired the plot gifted to her. Neither have a sale agreement nor gift deed. The bottom line is that DW2 arrived there post survey conducted by DW1 in between 2004 and 2005. At any rate, the area over which the Defendants are creating access road belong and is a property of PW1. To this end, the testimony of DW1, when was winding up on re-examination, was impressing, stated, I quote, and bold a portion of my interest,

*'The dispute in court is in respect of a road, **remember the area belong to Mama Dr. Sophia.** The road belongs to citizens, is located at Kigogo Fresh 'B'*

Had it been established that there was existing path or road or right of way prior execution of sale agreements exhibit P2 collectively, and recognized or identified therein, it could be said survey done had the effects of extinguishing (and locking neighbors) and abolishing existing roads or paths. However, there is no proof of existence of any road or

path prior, during and post-sale or amid survey in between 2004 and 2005.

The issues framed entailed me to determine whether the disputed land is a public road or a property of the Plaintiff, which I have already determined above in favour of the Plaintiff. The next question was whether the Defendants are trespassers on the disputed land, which could be a foregone conclusion. However before, I land there, as I have said hereinabove at the detailed preface, that technically the dispute between parties revolve around the question of easement and right of way. Therefore, if I embark deliberating on the second issues automatically, I will be limiting myself and leaving the real question on dispute between parties, unresolved.

It is common ground that PW1 and DW2 are neighbours to each other. Indeed, I have ruled the Plaintiff to be the rightful owner of a disputed portion of land into which DW2 and other neighbourhood, use it as an access road to their respective home. As put by PW2, construction of the intended wall fence by PW1 will mean and have the effects of total lockdown and complete denial of access by DW2 and neighbourhood community at large (not subject of impleadment herein).

That said, it is desirable for purpose of maintaining harmony and peace among neighbours for a road 'B' depicted in the detail survey, part of

exhibit P5, measuring 553 square meters, to retain its status and the servient land (Plaintiff) be entitled to a just and reasonable compensation from the dominant land or benefitting (the Second Defendant).

The amount of compensation for a piece of burdening land of 553 square meters aforesaid, will be assessed by a competent professional valuer from the Ministry of Lands, at the costs of the dominant land or benefitting.

I appreciate for closing submission filed by Mr. Kennedy Steven Sangawe learned Counsel for the Plaintiff and Mr. Aliko Mwamanenge & Mr. Gilbert Masaga learned Counsel for the Defendants.

Be as it may, the suit stand to be granted to the extent demonstrated above. On a note above, I will not make an order for costs.



E.B. LUVANDA
JUDGE
13/12/2023

Judgement delivered in the presence of Mr. Kennedy Steven Sangawe learned Counsel for the Plaintiff and Mr. Gilbert Masaga learned Counsel for the Defendants.



E.B. LUVANDA
JUDGE
13/12/2023