IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 307 OF 2021

TANZANIA NATIONAL ROADS AGENCY .....1ST APPELLANT
THE ATTORNEY GENERAL .....2ND APPELLANT
VERSUS
ABDALLAH MEGABE SINDOMA .....1ST RESPONDENT
PILI ELIZABETH SINDOMA .....2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Musoma)

(Kisanya, J)

dated the 30th day of March, 2021

in

Land Case No. 03 of 2019

JUDGMENT OF THE COURT

5th & 12th June, 2023

MAIGE, J.A.

This appeal has arisen out of an action brought in the High Court of Tanzania at Musoma (the trial court) by the respondents against the appellants for payment of Tanzania Shillings 100,407,720 as special damages for trespass unto their landed property on Plot No. 29 Block "B"

(High Density) located at Bunda District within the Mara Region with Certificate of Title No. 8109 (the suit property). After a full trial, the trial court ruled in favour of the respondents and declared them the lawful owners of the suit property having noted that they had established a good case for ownership of the same and the appellants had failed to prove their claim that it was within the road reserve of Nyamuswa- Bulamba-Kisorya and Nyamuswa-Bunda-Bulamba (the Road Reserve).

The appellants are dissatisfied with the whole judgment and by a memorandum of appeal, they have raised six grounds of appeal faulting the trial court for: **first,** holding that the respondents proved possession and ownership of the suit property; **second**, holding that the appellants failed to prove that the suit property or part thereof were within the Road Reserve; **third**, holding that the roads in dispute were not stipulated in the Government Notice No. 471 of 1962; **fourth**, holding that the respondents legally acquired the suit property; **fifth,** holding that the respondents are entitled to compensation for development of the suit property; and **sixth**, shifting the onus of proof of the respondents' claims to the appellants.

The facts out of which this litigation arose are to the following effect. The respondents jointly commenced an action against the appellants at the

trial court asserting ownership of the suit property. They testified as PW2 and PW1, respectively. Their evidence was common in material respect. They testified that, they were joint owners of the suit property having acquired it by way of allocation from the village authority way back in 1974. They constructed some buildings thereon in 1976 and since then, they had been in occupation of the same. They are in a possession of a certificate of title which was issued in 1993 (exhibit PE3). In 2005, they were served with a notice from the first appellant directing them to remove their buildings on the suit property for the reason that it was within the Road Reserve. Upon their complaint, the first appellant sent her officer to examine the suit property and, as a result, on 5th August, 2009, the first appellant wrote to them to the effect that the suit property was not within the Road Reserve (exhibit PE1). Further in their testimony, in 2019, the first appellant issued another notice signifying that the suit property was within the Road Reserve and ordered them to demolish it.

Both in the written statement of defence and oral testimony through the first appellant's engineer one Idd George (DW1), the appellants claimed that suit property had been, prior to 1962, part of the Road Reserve and as such, the respondents could not have in law acquired a

valid title thereon in 1974. According to DW1, the suit property is located at Nyamuswa Village where there is a road from Mwanza, Simiyu, Mara to Kenya which was declared a public highway in 1962 vide Government Notice No. 471 of 1962. He said, according to the said Government Notice, the width of the respective road is 22.5 meters from the centre of the road. The suit property, he testified, had encroached the road to the extent of 2.5 meters. While he admitted as a fact that exhibit PE2 was a genuine document from the 1st appellant, it was his evidence that the same was ineffectual in as much as it was allotted to them by persons without mandate.

In deciding the case, the trial court was guided by two issues namely; whether the suit property was within the Road Reserve and what reliefs were the parties entitled to. Before directing his mind on the first issue, the trial Judge in the first place considered if there was sufficient evidence to establish occupation of the suit property by the respondents from 1974 to the date of accrual of the dispute and observed as follows:

> *"According to **PW1** and **PW2,** the suit land is **Plot No. 29, Block B, Nyamuswa area, Bunda District.** The Plaintiff's evidence that they acquired the suit land in 1974 was not challenged by the*

defendants. Further, the plaintiffs tendered the certificate of title (Exhibit PE3) issued by the then Ministry of Lands, Water, Housing and Urban Development in 1993. Again, that evidence was not contested by the defendants. Therefore, the plaintiffs have proved on balance of probabilities that they have been in possession of the suit land."

It has to be noted that, before going a step further to determine whether the respondents' title on the suit property was invalid for the reason of being within the Road Reserve, the trial Judge addressed himself on the issue of burden of proof and remarked as follows:

"It is trite law that a person who alleges existence of certain facts is duty bound to prove the same. Since the plaintiffs have proved to have been in lawful possession and ownership of the suit land, the burden to prove that, the suit land falls within the road reserve lies on the defendants."

Having said that, the trial Judge concluded from his analysis of evidence that the appellants had not adduced sufficient evidence to establish that the suit property or part thereof was within the Road Reserve. He assigned two reasons. **First,** though the name of the road in question is not in Government Notice No. 471 of 1962, no evidence was led

to the effect that such road existed or that, its name had ever changed to reflect the pleaded one. **Second**, the first appellant's undeniable expression in exhibit PE1 that her officer had examined the suit property and established that it was not within the Road Reserve. In his view, therefore, unless there was a clear evidential explanation from the first appellant as to the reasons that led her departure from the position in exhibit PE1 ten years after, DW1's evidence could not be better than the evidence in said document. In particular, the trial Judge observed as follows:

> *"The above letter speaks for itself. That, the suit land was not within the road reserve. The said Exhibit was authored by the 1st defendant after visiting the suit land. What then made the 1st defendant to change her mind ten years later and issue the notice (**Exhibit PE2**) to the effect that the suit land is within the road reserve? DW1 did not enlighten the Court on factors considered before issuing the notice (Exhibit PE2) and whether the said same factors were not considered at the time of issuing **Exhibit PE1**. Further to that, **Exhibit PE1** was revoked by the 1st defendant because it was not referred to the notice which*

ordered the plaintiff to demolish the developments alleged to have been made in the road reserve. In the circumstances, the plaintiffs have two contradicting information from the 1st defendant on the suit land."

Finally, the trial Judge declared the respondents as the lawful owners of the suit property but dismissed the claim for special damages seemingly for being premature. In the alternative, he declared that the respondents were entitled to full and fair compensation in the event that the suit property was acquired by the first appellant. As we said above, the appellants are unhappy with the decisions and in consequence thereof, they have preferred this appeal.

At the hearing, Messrs. David Zakaria Kakwaya and Kenan T. Komba, learned Principal State Attorneys, Lameck T. Buntuntu and Saddy R. Sevingi, learned Senior State Attorneys, represented the appellants while the respondents had the services of Mr. Daud John Mahemba, learned advocate.

Through their counsel, the appellants had, before the date of hearing, filed written submissions which they fully adopted in their oral arguments with some highlights. The respondents did not file any written

submissions. However, their advocate presented oral arguments in opposition to the appeal. We applaud the counsel for their well-reasoned submissions, which admittedly have been instrumental in composition of this Judgment. Having closely followed their contending arguments in line with what is on the record of appeal, we shall herein after consider the merit or otherwise of the appeal.

We propose to start our discussion with the last ground of appeal where the trial Judge is faulted for shifting the onus of proof from the respondents to the appellants. It was submitted for the appellants that because the respondents were claiming ownership of piece of land which was within the Road Reserve, in terms of section 2 of the Highways Act, 1967, it was upon them to prove, on balance probability that it was a private property legally acquired before the establishment of the road. Reference was made to the case of **John Siringo and Others v. Tanzania Roads Agency and the Attorney General,** Civil Appeal No. 171 of 2021 (unreported). In his submission in rebuttal, the counsel for the respondents appears not to be in doubt of the position of the law stated in the case just referred. It was his contention, however, that the suit property was not within the Road Reserve.

We wish to state right away that, we are in agreement with the counsel for the appellants that under section 2 of the Highways Act, 1967, the onus to prove that a waste land lying within 33 feet from the centre of the road was his private property at the time of establishment of the road and, therefore, not part of the road, is on he who claims ownership of such property. It is our view, however, that such duty arises where a person alleging such right does so while acknowlding that the property he claims is within the road reserve. It does not arise, as in the instant case, where whether the same is in the road reserve is the subject of the dispute.

It seems to us that even in the case of **John Siringo and Others v. Tanzania Roads Agency and the Attorney General** (supra) relied upon by the counsel for the appellants, the fact that the disputed lands were within the road reserve was not debatable. The Court said that, as much as the appellants were claiming ownership on lands which were apparently within the road reserve, they had the onus to prove that the same were private properties before the road had been declared a public highway. Therefore, at page 22, the Court observed as follows:

> *"As stated earlier, since the appellants asserted that their respective portions of land lying within 33 feet*

from the centre of the road were private property, hence not part of the road, the burden of proof lay on each of them to establish their respective claims upon a preponderance of probabilities".

In this case, the respondents denied both in pleadings and evidence that the suit property was within the Road Reserve. On the other hand, the appellants asserted that it was as such. That being the case and indeed it was, the first appellant who is the custodian of the public highways is deemed to have special knowledge on whether and to what extent such property was within the Road Reserve. In terms of section 115 of the Evidence Act, therefore, she had a burden to prove, in the required standard, that the property in question or part thereof, was within the Road Reserve. The respective section reads as follows:

"115 In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Considering the above provisions, the Court, in the case of **Standard Chartered Bank Tanzania Limited v. The National Oil Tanzania Limited**, Civil Appeal No. 98 of 2008 (unreported), it observed as follows;

"As opined by the learned Judge, since S.C.B. was better the last to handle the cheque in Exhibit D5, they were in a better position to know where it was and had failed to produce a copy. The cheque, to say the least, was within S.C.B.'s special knowledge, having handled it and in its own admission, collected it for payment. While it is not our purpose in this appeal to set any banking standard, the availability of technological and archival process and the fraudulent banking transactions revealed, we are not convinced of the reasons advanced by Mr. Duncan that for a Bank to keep a copy of that cheque would have been a monumental task."

We are, for those reasons, of the opinion that the trial Judge did not, as alleged or at all, shift the burden of proof of the respondents' case on the appellants. The sixth ground of appeal is thus dismissed.

This now takes us to the third ground of appeal where the trial court is faulted for holding that the Nyamuswa-Buluba-Kisorya Road and Nyamuswa-Bunda-Bulamba Roads are not listed under Government Notice No. 471 of 1962. The submission for the appellants on this issue was that it was wrong for the trial Judge to make such a factual finding because in accordance with pleadings and evidence such fact was not in dispute. For

the respondents, it was submitted that, the appellants were bound to adduce evidence to establish that the said road is named in the Government Notice No. 471 of 1962 or that there was alteration of the name of the road. With respect, this issue cannot consume much of our time. We have carefully read the pleadings and evidence and, we are in agreement with the counsel for the appellants that the existence of the road in question was not in dispute but whether the suit property encroached the same is that which was contentious. That can be gathered from paragraphs 9, 10 and 11 of the plaint as well as the documentary evidence in exhibits PE1 and PE2. Besides, the second respondent is on record at page 9 of the records of appeal saying, "Our house is located at Msasani Hamlet, along Bunda-Nyamuswa Road". We entertain no doubt, therefore, that whether the roads in question existed was not in controversy as to oblige the appellants to adduce evidence in proof thereof. We thus allow the third ground of appeal.

We turn to the first, second and fourth grounds of appeal which in effect challenge the factual findings of the trial Judge that the respondents had proved to be the lawful owners of the suit property and the appellants had failed to prove that the same was in the Road Reserve. In this respect,

it was submitted that since the respondents trace their root of title on the suit property way back in 1974 when the road in question had already come into existence, it could not have been legally possible for the same to be allocated to them by the Village Authority or the Ministry of Lands, Housing and Urban Development. The reason being that, it being within a public highway, in terms of section 12 of the Highways Act, it was within the exclusive powers and management of the minister responsible for roads and the first appellant. It was contended, therefore, that the subsequent allocation by the village authority and the ministry responsible for land was a nullity ab initio as neither of them had mandate so to do. For the respondents, it was submitted that the suit property is legally owned by the respondents and no sufficient evidence was adduced to establish that it was within the road reserve.

From the submissions, we think, two issues have to be addressed in resolving the three grounds of appeal under consideration namely; whether there was evidence to establish title of the respondents on the suit property and if so, whether such title was created over a public highway and, therefore, unlawful. On the first issue, we think the evidence is clear and the trial Judge cannot be faulted. We agree with him that the

respondents' uncontested oral account that they acquired the suit property through allocation by the village authority, the acquisition which was subsequently formalized by the certificate of title in exhibit PE3, is sufficient to establish the claim. We say so because, there is a rebuttable presumption under section 40 of the Land Registration Act that a certificate of title is a conclusive evidence that the person therein mentioned has better title. It remains so, in our view, unless there be evidence in rebuttal to the effect that, it was not lawfully procured. In relation to this, we held in the case of **Amina Maulid & Two Others v. Ramadhani Juma,** Civil Appeal No. 35 of 2019 (unreported), as follows:

> *"In our considered view, when two persons have competing interests in a landed property, the person with a certificate of title is always to be taken the lawful owner unless it is proved that the certificate was not lawfully obtained."*

A similar position was taken in the case of **Leopold Mutembei v. The Principal Assistant Registrar of Titles and Another**, Civil Appeal No. 57 of 2017 (unreported), where it was observed that a certificate of title was not only a conclusive proof of ownership over the property but

more so "*evidence confirming the underlying transactions that conferred or terminated the respective titles to the persons named therein.*"

Applying the above principles, therefore, we are of the firm opinion that in the absence of evidence to the contrary, exhibit PE3 was a conclusive evidence that the suit property belonged to the respondents.

Having held that, the next question to consider is whether the respective title was obtained unlawfully. As we said elsewhere in this judgment, the onus to prove so was on the appellants. The appellants attempted to impeach the lawfulness of the respondents' title under scrutiny on account that it was allocated by the authorities which had no mandate. Their contention was based on the presupposition that the suit property was within the road reserve and thus within the exclusive powers of the minister responsible for roads.

At this juncture, it may be imperative to state that it is correct, as submitted for the appellants, that under section 12 of the Highways Act, all lands over public highways are within the exclusive powers and management of the minister responsible for roads. The respective section reads as follows;

"It is hereby declared that all public highways in Mainland Tanzania and the whole subsoil of all such highways are vested absolutely in the Minister"

Under section 2 of the same Act, highway is defined as to include its road reserve whereas the term road reserve is defined to mean *"open spaces and such waste land which, not being private property, lies within a distance of thirty three feet or such other distance from the centre of any public highway".*

The question which follows is whether there was sufficient evidence to establish that the suit property or part thereof was within the Road Reserve. To prove this, the appellants relied on the sole evidence of DW1. It was not exhaustive anyway. In effect, it was that the respondents' house on the suit property had encroached the road to the extent of 2.5 meters. His testimony in chief was completely mute as to who examined the suit property and established as such. In his submissions, the counsel for the appellants contended that the encroachment was express in exhibit PE3. We asked him whether the survey plan in the respective certificate of title or the certificate itself could assist the trial Judge to ascertain the distance between the suit property and the centre of the road and he conceded that it could not.

On their part, the respondents denied in evidence that the suit property was on the road reserve. Apart from their certificate of title in exhibit PE3, they also produced a letter from the first appellant dated 5th August, 2009 signifying that the first appellant's officer had examined the suit property and established that it was not within the Road Reserve. They denied the appellants' claim ten years after through exhibit PE2 that the same was within the Road Reserve. DW1 was challenged, by way of cross examination to clarify the said material discrepancy and testified at page 65 of the record of appeal as follows:

> *"It is true that Exhibit PE1 shows that the disputed land/ house was not within the road reserve. I don't know when the site was visited and examined, thereby, leading to Exhibit PE2."*

In our view, as exhibit PE1 was issued by the first appellant after inspecting the suit property and satisfied itself that it was not within the Road Reserve, and, there being oral account from PW1 and PW2 that it was not within the Road Reserve, we agree with the trial Judge that, the generalized oral evidence of the appellants through DW1 as discussed herein could not establish that the suit property was within the Road Reserve. Therefore, the appellants were expected to give evidence to the

effect that the inspection leading to issuance of exhibit PE1 was not correct and that, there was a fresh inspection which led to the new discovery ten years after as per exhibit PE2. Besides, since the issue was seriously contentious, demonstrative evidence through inspection of locus in quo was necessary wherein actual measurement of the distance of the suit property from the centre of the road could be made. In the circumstances, the trial Judge cannot be faulted. The first, second and fourth grounds of appeal are therefore, dismissed.

We remain with the fifth ground as to legality of compensation. The respondents pleaded compensation in terms of special damages for the intended demolition. The trial court refused to award it essentially on account that it was premature as nothing had been done at the instance of the appellants on the property. It, instead, declared the respondents lawful owners of the suit property. The alternative declaratory decree as to compensation, in our view, came as an alternative in the event that the suit property was acquired by the appellants. The appellants submit that, the respondents are not entitled to compensation as the suit property is within the Road Reserve and, therefore not their valid property. We have, however, held herein above that it was not and indeed, it is the lawful

property of the respondents. The fifth ground, therefore, remains with no legs to stand on and it is hereby dismissed.

In the final result, save for the complaint in the third ground of appeal which is allowed, the appeal is without merit and it is hereby dismissed with costs.

DATED at **MUSOMA** this 10th day of June, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 12th day of June, 2023 in the presence of Ms. Neema Mwaipyana, learned State Attorney for the Appellants and Mr. Daud John Mahemba, learned counsel for the Respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL