IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

LAND CASE NO. 3 OF 2008

PETER VICTOR XAVIER SAO ..... PLAINTIFF

VERSUS

1. THE CHAIRMAN UGWACHANYA VILLAGE COUNCIL
2. AYOUB KIBONDE t/a KIBONDE GENERAL (IR)

..... DEFENDANTS

13/10/2014 & 07/11/2014

JUDGEMENT

P. F. KIHWELO, J.

This is the judgement of the court in a matter which the plaintiff Peter Victor Xavier Sao filed a land case against the Chairman of Ugwachanya Village Council as the first defendant and Ayoub Kibonde t/a Kibonde General (IR) as the second defendant. The plaintiff prays for judgement and decree against the defendant for :-

(a) A declaration (sic) order to the effect that the plaintiff is the lawful owner of the suit property/land.

(b) A permanent injunction restraining the defendants from interfering with the plaintiff's land.

(c) An order compelling the 2nd defendant to dismantle and remove installed defendant's quarry stone machine.

(d) Payment of TShs. 140,700,000/= as pleaded in paragraph 9 herein.

(e) Costs of this suit.

(f) Any other reliefs this honourable court may deem just and equitable to grant.

The following issues were framed and recorded by the court;

1. Whether the plaintiff is a lawful owner of the disputed land.

2. Whether the first defendant was justified to allow the second defendant to establish a quarry in the disputed land.

3. Whether the second defendant established a quarry in the disputed land and used to sell gravel and stones and;

4. To what reliefs are the parties entitled.

During trial the plaintiff fielded two witnesses while the first defendant called four witnesses but the second defendant never appeared hence did not defend himself.

The brief background to this dispute is as follows;

That the plaintiff applied for and was allocated the suit property by the Village Government. First on 16/09/1989 the plaintiff was allocated thirty (30) acres and subsequently on 13/06/1990 the plaintiff was allocated another seventy (70) acres making a total of hundred (100) acres. Later the plaintiff was issued with an offer of right of occupancy dated 5/09/1990 in respect of farm No. 205 containing fourty (40) hectares situated at Ugwachanya Village at Mseke Ward, Mlolo Division at Iringa District. This is L.O NO. 119408 IRF/11711.

At a later date the second defendant was allowed by the first defendant to establish a quarry in the disputed land. That after the installation of that stone quarry the second defendant started extracting stones for selling as well as grinding stones into gravel for selling to house builders and therefore earning money. The plaintiff stated that from January, 2008 up to November, 2008 the second defendant earned TShs. 140,700,000/= out of the quarry business.

Hence the plaintiff came before this court for redress.

Before I start to address one issue after the other I must state that this matter proceeded ex-parte against the second defendant who elected not to appear and defend. Now going by the issues framed and recorded by the court. The first issue is whether the plaintiff is a lawful owner of the disputed land.

According to PW1 Peter Victor Xavier Sao the disputed land belongs to him and this is evidenced by the offer of right of occupancy "Exhibit P1". PW1 testified further that he was allocated the disputed land by the first respondent on 16/09/1989 and 13/06/1990 and this is evidenced by "Exhibit P2". PW1 went on to testify that he was dully paying rent in respect of the said piece of land and "Exhibit P3" is a clear testimony.

Similarly PW2 Galus Guido Salufu testified to the effect that he was a member of the Village Council in 1989 and 1990 as such was one of those who signed "Exhibit P2" that allocated to the plaintiff the disputed farm.

On the other hand the testimony of the defence witnesses namely DW1 Dominicus Ndega and DW2 Cosmas Masoud Kadinda admitted that the plaintiff was allocated the disputed land by the then Village Council. I am therefore satisfied that from the evidence on record there is no doubt that the plaintiff is the lawful owner of the disputed land. The first issue then is answered in the affirmative.

The second issue is whether the first defendant was justified to allow the second defendant to establish a quarry in the disputed land.

It is on record that DW1 during examination in chief had the following to say in part;

> *"When the first defendant allowed the second defendant, we did so knowing full well that the land did not belong to Peter Sao because the District Land Offices had not surveyed the area to which patch of land on the ground meant the said hundred (100) acres."*

While being cross examined by the learned counsel for the plaintiff, DW1 had the following to say;

"The second defendant was allowed to establish the quarry in 2007 or 2008. ---------- we knew that Peter Sao had no documents that is the letter of offer."

It is apparently clear from the evidence on record that the first defendant was not justified to allow the second defendant to establish a quarry in the disputed land hence in my considered opinion this issue is also proved in the affirmative.

Turning now to the third issue of whether the second defendant established quarry in the disputed land and used to sell gravel and stones there from.

It was testified by PW1 which testimony was supported by the testimony of DW1 and DW2 that the first defendant allowed the second defendant to install a quarry.

DW2 stated as follows;

"We did not allocate land to the second defendant. We just allowed him to install a quarry. He in deed

installed and started crushing stones and sold gravel and stones. The village was to get some revenue from the project but we could not get."

I am therefore satisfied that the first defendant allowed the second defendant to install the quarry in the disputed land and subsequently the second defendant started quarry business by crashing stones and gravel which were sold to builders. In my view this issue too was answered in the affirmative.

The fourth and last issue is to what relief are the parties entitled to.

The plaintiff has among other issues prayed before this honourable court for the payment of TShs. 140,700,000/= as a refund of value of the stones extracted from his registered land. In other words the claim for TShs. 140,700,000/= is special damages.

The plaintiff in this prayer simply stated that;

(d) payment of TShs. 140,700,000/= as pleaded in paragraph 9 herein.

Paragraph 9 of the plaint reads as follows;

> *"That from the month of January, 2008 up to November, 2008 the 2nd defendant has extracted unlawfully stones worth of TShs. 140,700,000/= of which an analysis of the same is annexed hereto and marked with the letter "B" forming par of the plaint."*

I have had an opportunity of looking closely at Annexture "B" which purports to be analysis of the TShs. 140,700,000/= claimed and I have two strong observations to make. One the said annexture was neither tendered nor admitted as an exhibit hence it cannot be relied upon in the final analysis. Two even if annexture "B" would have been admitted the credibility on its accuracy would be in question since the purported analysis was solely based on mere speculation by the plaintiff not being backed by any solid evidence to substantiate the claim.

It is a cardinal of principle law that special damages must be specifically pleaded and strictly proved. This has been celebrated in a number of times by the court. One such particular case is **Zuberi Augustino V. Anicet Mugabe** (1992) TLR 137 in which the Court of Appeal of Tanzania had the following to say;

"It is trite law that specific damages must be specifically pleaded and proved."

I am therefore of the considered opinion that although the claim for TShs. 140,700,000/= was pleaded the same was not proved as required by law. In my view the plaintiff is not entitled to the claimed amount or at all.

Before I make the final order I am compelled to make one final observation. While I may be tempted to consider whether the plaintiff did follow the proper procedures for acquiring the said disputed land as alleged by DW4 Fundi Ahmed Mihayo and evidenced in "Exhibit D1" in that the Village Council had no authority to offer more than 50 acres which was within the powers of the District Council, but my hands are tied since this issue was not framed by the court (Mwambegele J. my precedessor) as one of the issues for consideration. I am persuaded by Scrutton , L. J while referring to the **English Practice in Blay V. Polland and Morris** (1930) 1 KB 682:-

> *"Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a cause."*

In view of what I have demonstrated above I order as follows:-

(a) The plaintiff is hereby declared to be the lawful owner of the suit premise to wit farm No. 205 Ugwachanya Village, Mseke Ward in Iringa District.

(b) The defendants are permanently restrained from interfering with the plaintiff's land.

(c) The second defendant dismantle and remove the installed quarry stone machine.

(d) Costs are to follow the event.

P. F. KIHWELO

JUDGE

07/11/2014

Right of appeal is fully explained.

P.F. KIHWELO

JUDGE

07/11/2014