THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CIVIL CASE NO. 07 OF 2022

ALIPIPI BROWN MWANG'OMBOLA..... PLAINTIFF

VERSUS

IFAKARA TOWN COUNCIL ..... 1ST DEFENDANT

ATTORNEY GENERAL ..... 2ND DEFENDANT

JUDGEMENT

Hearing on: 21/06/2023

Judgement date on: 27/07/2023

NGWEMBE, J.

This judgment arises from a civil dispute instituted by Mr. Alipipi Brown Mwang'ombola against Ifakara Township Council for declaratory orders, specific damages and general damages as follows: -

i) Compensation of another piece of land to the plaintiff,
ii) Specific damage to the tune of Tshs. 2,750,000/= being the value of 22 seized logs,
iii) General damages to the tune of Tshs. 100,000,000/=,
iv) Costs of the suit.

According to his plaint, he owns 3 acres piece of land which he purchased from different persons in 1995, then planted several types of crops and trees. Later on, having sought permit from the relevant authorities he made a private forest for his future use. That his land was

near the village's graveyard. In 2011 the villagers invaded his land and used part of it as graveyard. Upon complaint to the defendant, they reached a settlement that the defendant will acquire his land for grave yard, valuation was made even the estimation of compensation to the plaintiff's entitlement. They agreed that he should therefore harvest his forest. But having fell down the trees, the relevant officers compounded him at Tshs. 200,000/= penalty, which they called *faini ya kukwepa ushuru wa kuvuna mazao ya misitu.* But though he paid the said fine, the logs were confiscated by the first defendant. About the acquisition, the defendant did not pay any of the agreed compensation.

On 19/04/2022 the court marked mediation failed and thus the following issues were framed: -

1) Whether the plaintiff's land was acquired by the defendants.
2) Whether the confiscation of logs by the defendant was lawful.
3) What are the parties' entitlements.

In endeavours to establish the case, each side had one witness. The plaintiff testified and tendered a number of documentary exhibits, while on the defence side likewise had one witness who testified and tendered one public document for noting. It is worth to note that the plaintiff's cause of action is against the first defendant only. The second defendant was joined as a statutory necessary party in suits against the government as per the government proceedings Act Cap. 5 R.E 2019.

The evidence given by both parties is summarised hereunder. Alipipi Brown Mwang'ombola testified on oath as PW1 that he was a teacher at Ifakara Secondary School from 1993 onwards, sometimes on 12/11/1995 he purchased land from January Msese and Severin Msese, the sale agreement was tendered as Exhibit P1. When he purchased the land, it had only one old grave. Thus, he planted some trees on that land.

In year 2011 some residents started burying their deceased loved ones in his land. He reported to a hamlet leader, but the people could not stop burying therein. He thus, wrote to the District Council, the letter was tendered and admitted marked exhibit P2.

The council did not respond, he faced the land officers who were also cold shouldered. But later the town council planned and surveyed his land for graveyard. He was informed by land officer through a letter dated 03/04/2013, same was tendered marked exhibit P3. Later the first defendant wrote him a letter dated 13/02/2014 promising to give him 6 plots of land as compensation, such letter was admitted as exhibit P4. Thereafter the defendant valued his land in question at Seven Million Shillings (7,000,000/=).

That he instituted a case at Kilombero District Land and Housing Tribunal, which was withdrawn for settlement. Later they met on 01/10/2019 and agreed on the value of the crops of the disputed land to be Tshs. 12,838,653/=, which was never paid. He therefore, prayed for payment of that value and 6 plots as compensation.

In cross examination he stated that, there was only one grave on the day of purchase. That before cutting down the trees, whose logs were confiscated after he paid a fine, he complied with the procedure by securing a permit from the Village Executive Officer.

On the defendant's side, Omary Tunduguru (DW1) testified on affirmation that he is a Planning Officer of Ifakara Town Council. That he supervises the implementation of planned areas. He explained how planning is done. That there is a Master plan (MP) and Town Planning (TP). The land which the plaintiff claims was planned for a graveyard in year 2009. That the plaintiff claimed for compensation of his land. The defendant visited the land for the purpose of assessment, intending to

compensate the plaintiff, but later the council changed its plan, thus, decided not to take the land and no compensation would follow.

The witness went further to testify that the council did not invite any person to bury in the plaintiff's land. In the abandoned plan, the graveyard plan comprised a total of 15 acres of land, within which the plaintiff's land was inclusive. That the plaintiff purchased the land when it was already planned for the said uses. He tendered the township map only for noting.

Taking from the pleadings and the evidences of both parties, the following facts are not disputed; *first* the plaintiff is the owner of the land estimated about 3 acres located at Kibaoni Ifakara. *Second*, some residents used part of the plaintiff's land for burying their beloved ones. *Third*, the first defendant planned that land for burial and arrangements for acquisition were made. *Fourth*, the plaintiff fell his trees with a view of lumbering, but he was penalised and the logs were confiscated by the first defendant. *Fifth,* after the plaintiff had surrendered the land and expecting compensation as per valuation report conducted by the first defendant, the first defendant changed the plan and decided otherwise thus the land reverted back to the plaintiff.

What seems to be in serious contention between the parties, includes the plaintiff's averment that the confiscation of logs was illegal and he is entitled to compensation equivalent Tshs. 2,750,000/=; that he is entitled to compensation for the land he surrendered. The compensation of 6 plots of land should be offered to him by the defendant as they agreed in the aborted plan, and reliefs for general damages.

In resolving the agreed issues, this court is mindful of what the law provides in respect of burden of proof. The law is trite that a person who claim any right basing on certain facts, he must prove that those

facts entitling him the relief do exist. Same is provided for under section 110 and 111 of **The Evidence Act, [Cap 6, R.E 2019]** which states: -

> *"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

Such proof must attain the required standard, which in civil cases is on balance of probability. This is what section 3 (2)(b) of **The Evidence Act** provides and there is a number of precedents on that. As to what balance of probability means, Joe W. Sanders, **The Anatomy of Proof in Civil Actions, 28 La. L. Rev. (1968)** made a very extensive discussion on this point. My interest is at page 299 and 301, where the author, one of the American Supreme Court Justices states: -

> *"If plaintiff's evidence weighs more than that of the defendant, the plaintiff wins, regardless of the degree of belief generated in the mind of the trier of fact... The rule does not require a party to prove a contested fact "beyond doubt," "beyond dispute," "beyond question," "conclusively," or to a "certainty." When the greater likelihood of the existence of a fact is reasonably determined from the evidence, the judge or jury finds the fact. The fact is accepted as true for purposes of the litigation. In short, it becomes a "juridical truth.""*

In essence, what the jurist above stated is parallel to our jurisprudence. Our courts have always held fast to the principle whenever they deal with the relevant cases, the subject is thus sufficiently precedents. The cases of **A. M (Ltd) Vs. A1 Outdoor Tanzania Ltd and Others [2007] T.L.R. 1; Hamza Byarushengo**

Vs. Fulgencia Manya & Others (Civil Appeal No. 246 of 2018) [2022] TZCA 207 followed the rule among others; and **in the case of Martin Fredrick Rajab Vs. Ilemela Municipal Council & Another (Civil Appeal No. 197 of 2019) [2022] TZCA 434,** it was particularly held: -

> *"Therefore, in civil proceedings a party who alleges anything in his/her favour also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the Court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved"*

The main task of this court is to resolve the framed issues. In so doing the court will examine the evidence on record, while applying the principles of the law of evidence, including those expounded above. The first issue is on whether the plaintiff's land was acquired by the defendants.

This court is aware that acquisition is a legal process. To rule this issue, I have made reference to the facts and law. But first, what constitutes acquisition? In a general interpretation offered by **The Black's Law Dictionary 9th edition**, acquisition is the gaining of possession or control over something. This means that land acquisition under the context means taking possession of the land or having control over the land. Same sense applies to **The Land Acquisition Act,** where powers and procedures for land acquisition are provided. The simple understanding should be this; the president may take the land which was being possessed by any person and plan that land for other government use or public purpose. The acquiring authority must pass through the process and eventually the land should fall under the complete possession or control of the acquiring authority.

In this case, the first defendant intended the suit land should be used for cemetery of the residents therein. As stated earlier, the plaintiff having agreed with the first defendant, he took very substantial steps in order to facilitate smooth acquisition. However, it seems for the reasons clearly known to the defendant, the plan was changed *suo motu*.

It is important to note here that, generally the President cannot be compelled to proceed with contemplated acquisition. Practically, some supervening events and change of circumstance may occur in the midst, in some cases. The process may halt and any person who incurred costs or any loss from the notice and other subsequent procedure is entitled to redress, as a matter of law. **The Land Acquisition Act, Cap 118 R.E 2019** which governs acquisition by the government in our jurisdiction provides same under section 19 (1) as hereunder quoted: -

> **Section 19.- (1)** *"Nothing in this Act shall be construed as requiring the President to complete the acquisition of any land unless he has entered into possession of the land or has failed within one month of the judgment of the Court to intimate to the Court that he does not intend to proceed with the acquisition:*
>
> *Provided that, where acquisition is not completed the owner of the land and all persons entitled to any estate or interest in the land shall be entitled to receive from the Government all such costs as may have been incurred by them by reason or in consequence of the proceedings for acquisition and compensation for the damage (if any) which they may have sustained by reason or in consequence of the notice of intended acquisition."*

I understand that the first defendant had been inconsistent and uncertain in its decisions on whether the acquisition would proceed or

not. It is after being sued, when DW1 stated that, the first defendant was no longer interested with the acquisition. This court foresee that the approach adopted by the defendant was strange. For instance, in exhibit P3 (letter dated 03/04/2013) and Exhibit P4 (letter dated 13/02/2014), the Director of Ifakara Town Council stated that, upon acquisition, the plaintiff will be compensated by being given 6 plots of land and for the improvement he would be compensated by a responsible department upon verification. But the same office kept changing the position without informing the respective plaintiff.

At least, we take cognizance of DW1's testimony in this case to the fact that, the first defendant is no longer interested with a plan so could not proceed with the planned acquisition. DW1 in his testimony stated that, the defendant had secured the most appropriate land for graveyard.

Despite the fact that the defendant acquired more suitable land for graveyard, but is clear the first defendant had not taken occupation and control of the land and the plaintiff did not complete his handing over procedure. In such circumstance, acquisition would be complete upon completing surrender of that land by the plaintiff to the defendant together with payment of compensation, and the actual possession and control by the first defendant. That the plaintiff's land was not acquired by the second defendant because under the circumstance the acquisition process was aborted. Therefore, the first issue is resolved in negative.

The second issue is on lawfulness of confiscating logs. Noteworthily, the defendants did not object on this averment made by the plaintiff. Even the Written Statement of Defence (WSD) is silent and the testimony of their defence as well, did not address on the issue of confiscating those logs. Therefore, the law is clear on this issue as per Order VIII Rule 3, 4 and 5 of **The Civil Procedure Code, Cap 33 R.E**

2019. Always the Written Statement of Defence should be devised regarding denials and admissions of facts as quoted hereunder: -

> **Rule 3**. *"It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*
>
> **Rule 4**. *Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.*
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> **Rule 5** *"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: Provided that, the court may in its discretion require any fact so admitted to be proved otherwise than by such admission."*

Following the above rules of pleadings, the fact that the first defendant confiscated the logs from the plaintiff was admitted by both defendants. Under section 60 of **the Evidence Act,** the facts which by any rule of pleading parties are deemed to have admitted by their pleadings, need no proof. During hearing, the first defendant tried to bring forward facts not stated in the WSD, but failing to substantiate by evidence what they put in their WSD.

The rule has been stable for decades, unexplained contradictions and inconsistencies may depreciate the evidence unless the court has resolved them to be minor and obvious ones considering the circumstance of a particular case. In the case of **Happy Kaitiri Brilo t/a Irene Stationary & Another Vs. International Commercial Bank (T) Ltd, Civil Appeal 115 of 2016,** when facts pleaded are not supported by the evidence and vice versa, the Court ruled that: -

> *"Settled is the principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."*

The main question in this issue is whether the confiscation was justifiable by law? To answer this issue the plaintiff stated that the trees he fell were in what he calls a private forest, which he kept for his own use having obtained a permit from the relevant authority. That he obtained a permit from the Village Executive Officer and paid requisite levy at the village level before cutting them down. But the first defendant, condemned him to pay fine of Tshs. 200,000/= which same was paid in full and yet the first defendant proceeded to confiscate those logs. The plaintiff averred that, even if that fine would be legal, which he believes was not, confiscation of logs constituted double punishment. The defendants stated in their WSD that the cutting down of the natural trees by the plaintiff was illegal, hence the fine imposed was proper. However, they did not submit anything on legality or otherwise of that confiscation.

I have taken note of the general principles of Environmental Laws including **The Forests Act, No.7 of 2002** and **The Forest (Amendments) Regulations, 2017** together with **Forest Rules 2004**, I gather among other matters that, a person occupying the land

lawfully under right of occupancy, may use such land as forest land or apply for the land be used for right of occupancy. Also, the minimum criteria for the management of forest under the Act, has been considered, which will not be discussed at length on this case.

But under the circumstance of this case, the plaintiff had stated that he followed the procedure, a fact which was never disputed. I am of the settled position that, the plaintiff had every right to enjoy his property having followed all legal procedures. Even by assumption that there was any contravention against the Municipal rules, which were not stated, the plaintiff was already penalised by paying fine. The defendant did not state if the law allowed confiscation after the person has paid fine. The court is thus of the position that, the defendant's act of confiscating the plaintiff's logs was illegal and unwarranted.

The confiscation not having been backed by any law, the conduct deserved to be condemned. Taking such confiscation in connection to the general conduct of the first defendant, it suggests that, the first defendant never honoured any right to property entitled to the owner. Basically, right to own property is among the rights protected by **The Constitution of The United Republic of Tanzania**, under article 24 providing that: -

> **24 (1)** *"Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law.*
>
> *(2) Subject to the provisions of sub article (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation."*

The Land Acquisition Act (supra) and other laws were enacted to regulate the process of compulsory acquisition. It is not fair to use any powers under that statute with an ill motive or putting forward any technicality whose end result, would be to deny a person of those rights.

Having ruled as above on the first two issues, what remains is the issue of reliefs to which parties are entitled. The plaintiff in his plaint prayed for compensation of another piece of land; specific damage of Tshs. 2,750,000/= being the value of 22 seized logs and general damages of Tshs. 100,000,000/=.

During hearing he added that he prays for compensation of Tshs. 12,838,653/= value of the crops and 6 land plots as agreed with the first defendant. However, this court is aware that these reliefs were never sought in the plaint, while the rule that parties are bound by their pleadings is still alive and binding; see the cases of **James Funke Gwagilo Vs. Attorney General [2004] T.L.R 161** and **Martin Fredrick Rajab Vs. Ilemela Municipal Council & Another (supra)** among others.

On the other side, the defendants asked this court to dismiss the suit. This court upon examining the facts, has formed a firm opinion that, though the plaintiff's land was never acquired, the plaintiff suffered considerable damage from the first defendant's change of plan. The plaintiff prayed in his plaint that the court should be pleased that he be compensated another piece of land. This is difficult to award. His land is said to have some graves; however, the number of those graves were not disclosed. The plaintiff stated also that, when he purchased the land, it had one grave and in 2011 few were added. His land is close to the established graveyard. Considering that, it is not the whole land was invaded, and the fact that acquisition was never actualised, compensation of another piece of land will not be appropriate.

The provisions of **The Land Acquisition Act**, earlier referred, imply that a suit cannot be brought in court to enforce the process of land acquisition be completed by any means. To its contrary, where the acquisition fails, a person is entitled to receive from the government all costs incurred in consequence of the proceedings for acquisition and compensation for the damage which they have sustained by reason of the notice of intended acquisition.

That being the case, I agree with the defendants that the plaintiff can still retain his land. The compensation of 6 other plots and Tshs. 12,838,653/=, are unacceptable. The reason is obvious, that such compensation was meant to remedy the plaintiff's loss when the land would be acquired; the 6 plots of land were to replace acquired land and Tshs 12,838,653/= as value of the crops in that land. The court cannot grant such reliefs. However, on the value of the logs whose confiscation was unlawful, the plaintiff deserves a recourse.

Regarding the general damages, I am aware is within the discretion of this court. In exercising the discretion judiciously, I have considered the general inconveniences the plaintiff has suffered. At the time of withdrawal, the defendants did not incur any serious cost or loss as the plaintiff did. The plaintiff not only surrendered the land constructively, but also, he fell the trees which he reserved in his land for future use and he remained stranded struggling with the defendant for not less than 11 years hoping that, he would get the promised compensation. The first defendant was dilatory in making the compensation and did not communicate its withdrawal. While the plaintiff endeavoured to settle the matter amicably by meeting with the first defendant, good promises were given by the first defendant, but it seems they were sham.

Under the circumstance, this court is of the opinion that the plaintiff deserves general damages. I have considered general rules governing award of general damages. As a matter of law, general damages need not be proved. But the law has never meant that general damages are blindly awarded, it has never been the practice in our jurisdiction that a person will be awarded any amount in general damages as if there were no parameters. Actually, there are many factors to consider and the court should be guided by the facts of a particular case in measuring the award. It was clearly stated in the case of **Alfred Fundi Vs. Geled Mango and 2 Others, Civil Appeal No. 49 of 2017** that: -

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same."*

In this case, as earlier pointed, the plaintiff surrendered the land and cut down his trees which he reserved for future use. He sat on the fence for not less than 11 years waiting for the defendant's decision. The first defendant did not keep the promises and had mixed decisions, it was never clear to the plaintiff if the first defendant had abandoned the acquisition plan, not even after being served with notice of intention to sue. It happened that even the logs, which would be the little the plaintiff thought he would save, was unlawfully seized by the first defendant. It was until DW1 stated before this court that is when became known to the plaintiff that the first defendant had changed the mind about the acquisition plan.

Again, the plaintiff endeavoured to settle the matter amicably and the defendant offered promising promises just to be realised later that

they were mere sham. Despite the evidence showing so clearly that the first defendant agreed to compensate the plaintiff, DW1 being guided by the learned State Attorneys denied the fact completely. I think this was a strange trait by the public office like the first defendant.

This court has deeply considered the laws, justice and equity under the circumstance exhibited above and has reached to a verdict that it will be fair and just if the plaintiff will be awarded Tshs. 10,000,000/= as general damages. Also, Tshs. 2,750,000/= for the confiscated logs are awarded and be paid by the first defendant. Same facts above dictate that, costs should follow the course as against the first defendant.

Order accordingly.

Dated at Morogoro this 27th July, 2023.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

27/07/2023

Court: Judgement delivered at Morogoro in chambers on this 27th July 2023 in the presence of Mr. Juma Mwakimatu, Advocate for the plaintiff and in the presence of Ms. Emma Ambonisye, learned State Attorney for both defendants.

A.W. Mmbando

DEPUTY REGISTRAR

27/07/2023

Right to appeal to the Court of Appeal explained.

A.W. Mmbando

DEPUTY REGISTRAR

27/07/2023