IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND CASE NO. 154 OF 2018

GODLOVE MTWEVE.....PLAINTIFF

VERSUS

CHIEF EXECUTIVEW OFFICER,
TANZANIA NATIONAL ROADS AGENCY.....1ST DEFENDANT
ATTORNEY GENERAL.....2ND DEFENDANT

Date of Order: 29.03.2021
Date of Judgment: 12.04.2021

JUDGMENT

V.L. MAKANI, J

The plaintiff in this suit is GODLOVE MTWEVE. He is praying for judgment and decree against the defendants as follows:

1. *A declaratory order that the plaintiff is the lawful owner of the suit property.*

2. *A declaratory order that the demolition f the suit preoprty was unlawful.*

3. *An order for the defendants jointly and severally to pay the plaintiff TZS 118,128,500/= (One Hundred Eighteen Million, Three Hundred Twenty Eight Thousand, Five Hundred) being compensation for unlawful demolition of the suit property.*

4. *An order for the defendants to pay general damages as it will be assessed by the court.*

5. *An order for costs of this suit*

6. *Any other relief(s) this honourable court shall deem fit and just to grant.*

According to the plaint, the plaintiff alleged to be the lawful owner of the property situated at Kimara Stop Over within Ubungo Municipality in Dar es Salaam (the **suit property**). He alleged that sometimes in July 2017 the 1st defendant, Tanzania National Roads Agency (**TANROADS**), unlawfully demolished his house of four (4) rooms without compensation for what was referred as expansion of the road. He said part of the suit property was not liable for demolition as it was not part of the road reserve. In that respect, the plaintiff alleged that he deployed a lot of energy to develop the remaining part of the suit property and continued living in the said suit property. Allegedly on 19/03/2018 the **TANROADS** unlawfully demolished the remaining part of the suit property claiming that it was still within the road reserved area. The plaintiff is praying for the orders set out above.

In their Written Statement of Defence, the defendants gave general denials to the assertions by the plaintiff and further stated that the plaintiff's property was within the road reserve and according to the law he was not entitled to any compensation or at all. They prayed for the suit to be dismissed with costs.

In this suit the plaintiff was unrepresented and Ms. Grace Lupondo, learned State Attorney appeared on behalf of the defendants.

The issues that were framed for determination were as follows:

(a) *Whether the plaintiff is the lawful owner of the suit property.*

(b) *If the first issue is in the affirmative, whether the suit property encroached the road reserve.*

(c) *What are the parties entitled to?*

PW1 was the plaintiff himself. He said in May, 2017 TANROADS made expansion of the road at Kimara area. He said he was among the persons who were affected by the said expansion. He said TANROADS marked his house showing the area they wanted him to demolish, and he did so under the instructions of TANROADS. He said there remained a house and he made improvements thereon and continued living in the said house. He said on 15/03/2018, TANROADS came back again and made measurements and said they made mistakes and that the whole house was supposed to be demolished. He said he wrote a letter to TANROADS Ubungo stating that there was no notice, even for the first demolition though he got one on 19/03/2018. He said he wrote the letter on 15/03/2018 but he did not get a

response and though he was within the 7 days' notice TANROADS demolished his house. The plaintiff tendered a letter from TANROADS dated 19/03/2018 (**Exhibit P1**), the Valuation Report of the plaintiff's house at Kimara Stop Over (**Exhibit P2**) and Sale Agreement allegedly between the Plaintiff and Mwanahawa Joseph (**Exhibit P3**). He said **Exhibit P2** showed that the cost of the house was TZS 118,328,500/= and so he prayed for the court to grant him compensation as he had been keeping the suit property in development for more than 15 years.

On cross-examination the plaintiff said according to **Exhibit P1** the notice showed that there was still a house, but it did not show that ¼ of the said house was already demolished. He admitted that a part of his house was in the road reserve. He also admitted that the Sale Agreement **Exhibit P3** was erased by a correction fluid and further agreed that the name in the Sale Agreement before the erasure was Justine Mtweve who is his son. He also admitted that the payer of the balance of the purchase price appears to be Justine.

PW2 was Rehema Yusuf Chogo. She told the court that she is the Chairman of the Cell (*Balozi wa Shina*) and the plaintiff was one of

her citizens. She said in 2017 there was demolition of houses and the plaintiff's house was half demolished. She said on 15/03/2018 TANROADS came back and said there was a mistake, and that the plaintiff's remaining house had to be demolished and he was given 7 days. She said TANROADS came back before the expiry of the 7 days and demolished the house and threw the plaintiff's properties out. She said the plaintiff reported the damage to her as a cell leader and she gave him a note to go to *Serikali ya Mitaa* who directed him to TANROADS.

On cross-examination she said TANROADS were in the exercise of expansion of road to reduce congestion and the citizens who were affected were in the road reserve. She said she did not see the actual demolition she just saw when the house was already demolished.

PW3 was Boniface Hebel Mwalongo. He said he was present when demolition of the plaintiff's house took place. He said the demolition took place on 15/03/2018 during lunch time and the plaintiff's wife was crying that they were given 7 days but the time was yet to expire. He said TANROADS demolished the house despite that there were

properties and children. There was a tenant, but he had already left with his properties.

On the part of the defence their only witness was Johnson Rutechula (**DW1**). He said he is an employee of TANROADS in the Development section as Social Welfare Officer. He said the Development section deals with various projects by TANROADS. He said expansion of roads is led by the law, the Road Act No. 13 of 2017. He said according to the law they have to identify what is within the area of construction such as residential houses, infrastructure like water and electricity. He said these things have to be identified before the project to assess the cost of the project. He said most importantly they look at properties which are within the expansion area and they are removed all according to the law. He said in July, 2017 notices were distributed to people in the area from Kimara Stop Over to Kiluvya because there were a lot of people who were in the road reserve. He said **Exhibit P1** was a notice to the plaintiff to remove his house wall and drainage pit as they were all within the road reserve. He said the notice was dated 19/3/2018 and there were about 1400 houses which were within the reserve area. He said when they issue notices, they do not look at ownership they only look at whoever is in the road reserve

and the plaintiff was in the road reserve. He said they put in notices in 2017 but they discovered that the plaintiff did not completely move as he was still within the reserve area and so they again demolished the house which was still within the 90 meters according to the law. He said the plaintiff had received notice in 2017, the notice of 2018 was just for him to remove his properties. He said the plaintiff is not entitled to compensation as his house was within the road reserve according to the law. He prayed for the suit to be dismissed with costs.

In his final submissions, which were drawn on his behalf by the Legal and Human Rights Centre, the plaintiff submitted that the process of demolition of the suit property was *void ab initio*. He said the notice itself though addressed to the plaintiff was never received by the plaintiff and it was not signed by the Ward Executive Officer. He said according to the Road Management Regulations, 2009 (GN No. 21 of 2009) reserved area is 90 meters which is 45 meters from each side of the road from the centre. He said the suit property was far from the 45 meters and so was not subject of demolition. He said TANROADS unlawfully demolished the suit property without compensation to him. He said **DW1** was a social worker only and so

he did not have the skills to determine and know the exact road reserve area and his evidence did not tally with the written statement of defence. The plaintiff relied on the cases of **Hemed Said vs. Mohamed Mhilu [1984] TLR 113** that the defence failed to call a material witness so the court should draw and adverse inference. He also cited the case of **Makori Massaga vs. Joshua Maikambo & Another [1987] TLR 39** that parties are bound by their own pleadings and are not allowed to set up a new case. The plaintiff went on submitting that he understands that expansion of public road is of public interest, but such interest should consider recognition and protection of individual rights including lawful owner of their exclusive land. He said the land regime in Tanzania is very clear when it comes to public interest vis a viz individual right. He said section 24 of the Constitution of the United Republic of Tanzania provides that there has to be compensation to all private land that has been acquired; and also, section 3(1)(g) and 4(3) of the Land Act CAP 113 RE 2019 provides for full, fair and adequate compensation to the person occupying land when his land is subject of acquisition.

He said in view of what he has submitted he is entitled to full, fair and adequate compensation and also damages due to unbearable injuries including being left homeless.

On the part of the defendant Ms. Lupondo drew and filed submissions on behalf of the defendants. On the first issue as to who is the lawful owner of the suit property, Ms. Lupondo said the plaintiff has failed to prove that the suit property belongs to him. She said the main document to prove ownership is **Exhibit P3** the Sale Agreement but the name in the Sale Agreement is not that of the plaintiff but of Justine Mtweve and she said the plaintiff confirmed this and alleged that the writer mistakenly wrote Justine instead of him. Ms. Lupondo said **Exhibit P3** cannot therefore suffice to prove ownership of the demolished house the subject of the suit as there is no evidence before the court showing for sure that the suit property belonged to the plaintiff.

Ms. Lupondo went on submitting that the notice **Exhibit P1** according to **DW1** was addressed to the plaintiff by TANROADS for road expansion purposes only as the person who can know as to matters of ownership is the Commissioner for Lands. She said

according to section 110 (1)(2) and 111 of the Evidence Act CAP 6 RE 2019 the burden of proof was on the plaintiff who alleged that he was the owner of the suit property. She said the plaintiff has failed to prove ownership, so the first issue is answered in the negative.

As for the second issue Ms. Lupondo said though it has been established that the answer to issue number one is in the negative but still there is enough evidence that the suit property encroached the road reserve. She said the plaintiff in his testimony said he had to demolish part of his house because it was in the road reserve, so it meant the property encroached the road reserve. She said even **PW2** and **PW3** all admitted on cross-examination that the suit property was demolished because it encroached the road reserve. She said the evidence of **DW1** also corroborated these testimonies in that the suit property was demolished according to the **Exhibit P1** which is 90 meters from the centre of the road. She said **DW1** testified that all the legal measures were taken care of according to the Highway Act CAP 167 RE 2002, The Highways (Width of Highways) Rules, 1955 (GN. No. 120 of 1955), the Road Act No. 13 of 2007 and the Roads Management Regulations, 2009.

As to what reliefs the parties are entitled, Ms. Lupongo said the plaintiff is not entitled to the reliefs prayed because nothing wrong was committed against him. She said it have been proven that the suit property was within the road reserve contrary to the law thus he cannot be compensated for encroaching the road reserve. She relied upon the case of **Ntyahela Boneka vs, Kijii cha Ujamaa Matala [1998] TLR 156** where the court held that a person is entitled to compensation for improvements effected on the land provided that at the time of carrying out such improvements, she had apparent jurisdiction for doing so.

As for the damages that were claimed by the plaintiff for payment of TZS 118,328,500/=, she said these were specific dames which needs to be strictly proved. She cited the cases of **Bamprass Star Service Station vs. Mrs Fatuma Mwale [2002] TLR 390** and **Geita Gold Mine Limited vs. Ignas Athanas, Civil Appeal No. 227 of 2017.** She said the plaintiff failed to specifically prove the damages as he relied on the Valuation Report (**Exhibit P2**) which on the plaintiff's own admission was conducted before the demolition. She said there was no Valuation Report done after the demolition in 2018 and this cannot help in strictly proving the specific claim of TZS

118,328,500/=. She further submitted that the valuation itself was not verified by the Government Chief Valuer as required by section 7 of the Valuation and Valuer Registration Act No. 7 of 2016 and Regulation 6 of the Land Assessment of the Value of Land for Compensation) Regulations, 2001. She said since **Exhibit P2** was not confirmed by the Government Valuer then it was contrary to the law. She said since the plaintiff has failed to prove any wrongful act against him then he is not entitled to damages/compensation. She cited the cases of **Matiku Bwana vs. Matiku Kwikubya & Another [1983] TLR 364** and **Patel vs. Samaj & Another [1944] EA CA, 1.** She prayed for the suit to be dismissed with costs.

Having briefly stated the case, the evidence and final submissions, I will now embark on tackling the issues raised in the manner they were framed seriatim.

It is a fundamental principal of law under the Law of Evidence Act CAP 6 RE 2019 that whoever desires a court to give judgment in his/her favour he/she must prove that those facts exist.

Section 110 (1) (2) and 112 of the Law of Evidence Act CAP 6 RE 2019 reads as follows:

> *"Section 110(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *Section 110(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
>
> *Section 112 The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."*

In the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2004** (unreported) the Court of Appeal held that:

> *".....it is an elementary principle that he who alleges is the one responsible to prove his allegations"*

Also, in the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (CAT)** (unreported) where it was further held that the party with legal burden also bears the evidential burden on the balance of probabilities.

In the present case, the burden of proof at the required standard of balance of probabilities is left to the plaintiff being the one who alleged that he is the owner of the suit property and the defendants unlawfully demolished his house and that he is entitled to compensation and damages that he has claimed. What this court is to decide upon is whether the burden of proof has been sufficiently discharged by the plaintiff.

The first issue is whether the plaintiff is the lawful owner of the suit property. The principal evidence given by the plaintiff to prove ownership was the Sale Agreement (**Exhibit P3**).

As noted by the learned State Attorney **Exhibit P3** was tampered with in that the name of Justine Mtweve was erased and was substituted by the name of the plaintiff. Unfortunately, on the date of payment of the balance the name was erased once again. The plaintiff on cross-examination admitted that the Sale Agreement was erased but went on to say that "*Justine*" is his son's name and the plaintiff himself is usually known as "*Baba Justine*". Indeed, the said **Exhibit P3** vividly reflects that the name of *Justine* was erased and substituted by the name of the plaintiff "Godlove". The issue that

"Justine" is the plaintiff's son, and that the plaintiff is also known as *"Baba Justine"* was raised for the first time during cross examination. It was not in the pleadings or in the main oral evidence. If at all the suit land belonged to the plaintiff then he would have had proper documents to prove his ownership. Or if the plaintiff's intention were genuine then he would have made an explanation in the plaint elaborating who is *"Justine"* and his relationship to the plaintiff. The silence on the part of the plaintiff on this issue until it was raised during cross-examination draws an adverse inference on the part of the plaintiff that the suit property did not belong to the plaintiff and if it did then the obvious tampering of the names in the Sale Agreement (**Exhibit P3**) would not have been reflected. The fact that he is well known as *"Baba Justine"* is also questionable. If the office of *Serikali ya Mtaa* knew him as such, then the Sale Agreement would have been in that name and not in the name of *"Justine"* alone, at least *"Baba Justine"* would have appeared in the brackets. In the absence of a proper explanation, the tampering of the Sale Agreement has lowered the evidential value of **Exhibit P3** if not diminished it completely. This court cannot therefore safely rely on the said **Exhibit P3** and it is thus disregarded. In the absence of **Exhibit P3** then there is no proof that the plaintiff is the owner of

the suit property. In the result therefore, the court is of the considered view that the plaintiff has failed to prove that he is the owner of the suit property as such the first issue is answered in the negative that the plaintiff is not the lawful owner of the suit property.

The second issue is, if the first issue is in the affirmative, whether the suit property encroached the road reserve. As we have already established herein above, the answer to the first issue is in the negative, that plaintiff is not the lawful owner of the suit property. In essence there is no need to address this issue or at all. However, without prejudice, there is, as correctly said by learned State Attorney enough evidence to show that the suit property encroached the road reserve. It was the plaintiff evidence that he was given notice and he demolished part of the suit property. This was ascertained by **PW2** and also **PW3**. This evidence in itself reflects that the suit property was in the road reserve. The plaintiff claims that there was no notic but **Exhibit P1** reflects that it was a reminder as prior notices wer issued in 1997, 2014 ,2015 and 2016. The said exhibit categorically stated that the suit property encroached the road reserve and the said notice was received by Selina Mtweve and also by *Afisa Mtendaji Kata* (Ward Executive Officer) one Salamba who is a local

representative. The plaintiff claims the Ward Executive Officer did not sign the notice and **PW2** said she was not informed of the demolition, but it is obvious that a local leader was already informed of what would happen and he had a duty to pass on the information to the residents within his locality.

The plaintiff claimed that the suit property did not encroach the road reserve. And in the final submissions he emphasized that the Regulation 29(2)(f) of the Roads Management Regulations, 2009 (GN. No. 21 of 2009) which provides widths of the road provided 90 meters and that is 45 meters from the centre of the road from both sides. With due respect, the interpretation by the plaintiff is not proper as the said Regulations are not read independently but with the Highways (Width of Highways) Rules, GN. No. 126 of 1955 whereby Regulation 3 provides that measurement of the width lies within the distance from the centre. In that respect, as was said by **DW1** the Morogoro road width was 90 meters from the centre which resulted to the suit property being in the road reserve and subject to demolition. In the final submissions the plaintiff said **DW1** was not an engineer. But this was not raised when the said **DW1** was giving evidence and if he wanted to shake his evidence vis a viz the

academic qualification, he could have done so in cross-examination something he did not do. In the result the evidence shows that the suit property encroached the road reserve of 90 meters contrary to the law.

The last issue is to what reliefs are parties entitled to. As it has been established that the suit property does not belong to the plaintiff then the claim for compensation of TZS 118,128,5000/= would not stand. However, and without prejudice to the above, the said claims fall within the realm of special damages and therefore the plaintiff still had a duty to specifically prove them. It is the law that where there is a claim of special damages the same must not only be specifically pleaded, but also strictly proved. See the cases of **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137, Peter Joseph Kilibika & CRDB Bank Pic vs. Patrick Peter Mlingi, Civil Appeal No. 37 of 2009 (CAT)**(unreported), **Matiku Bwana vs. Matiku Kwikubwya** (supra) and **Bampras Start Service Station Limited** (supra).

In the present case the plaintiff in proving compensation relied on the Valuation Report (**Exhibit P2**). The said report, as correctly said by Ms. Lupondo, was not verified by the Chief Valuer according to

Section 7 of the Valuation & Valuer Registration Act, 2016 and Regulation 6 of the Land (Assessment of Value of Land for Compensation) Regulations, 2001. The said legislation requires the Chief Valuer to verify if the valuations are in compliance with the law. In the absence of the verification by the Government Chief Valuer then the Valuation Report is of no consequence and is disregarded. The amount of compensation which has been pegged on the said report is subsequently dismissed.

The plaintiff has also claimed for general damages to be assessed by the court. The court discretionarily awards general damages after taking into consideration all relevant factors of the case (see the case of **Cooper Motor Corporation Limited vs. Moshi Arusha Occupational Health Services [1990] TLR 96**). In the course of the hearing the plaintiff did not state the injury that would warrant grant of general damages because as stated hereinabove, the suit property did not even belong to him. The plaintiff claimed that he was left homeless but at the same time told the court that he has another house in Kinyerezi. So, he was not rendered homeless as claimed. In that respect I find it unnecessary to award any damages to the plaintiff and I hold as such.

For the reasons I have endeavoured to address hereinabove, I hold that the plaintiff has failed to prove his case and is not entitled to any of the reliefs prayed in the plaint. Consequently, the suit is hereby dismissed with costs.

It is so ordered.

V.L. MAKANI
JUDGE
12/04/2021